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CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

OF THE

STATE OF MISSOURI,

FROM APRIL 4, 1892, TO MAY 10, 1892.

REPORTED BY
DAVID GOLDSMITH, of the St. Louis Bar,
AND
BEN ELI GUTHRIE, of the Macon City Bar,
OFFICIAL REPORTERS.

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Hon. SEYMOUR D. THOMPSON, } *Judges.*
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JUDGES OF THE

KANSAS CITY COURT OF APPEALS.

Hon. J. L. SMITH, *Presiding Judge.*

Hon. JAMES ELLISON, } *Judges.*
Hon. T. A. GILL, }

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TABLE OF CASES DETERMINED.

A

Adams v. Adams 592
Akin, Cramer v 163
Appleby, Whitlock v 295
Ashland Mill Co., Martin v 23

B

Baker v. McInturff 505
Bartlett v. Eddy 32
Bartley v. Trorlicht 214
Beckman v. Phœnix Ins. Co ... 343
Beckman v. Phœnix Ins. Co ... 604
Behr, Sauer v 86
Blackwell v. Fry 638
Blank, Burnham, Hanna, Munger & Co. v. 56
Bragg, Donahue v 273
Brick & Terra Cotta Co. v. Hull. 433
Brunswick Flour Co., Colburn & Hamilton v 415
Bunker v. Hibler 536
Burnham, Hanna, Munger & Co. v. Blank 56
Bush, Lamb v 337
Byrd v. Steele 419

C

Carter, Nichols v 401
Carter v. Phillips 319
Cassity, State v 300
Cassity, State v 302
Caughron, State v 311
Chaney, State ex rel. v 511
Chicago, R. I. & P. Ry. Co., Masterson v 6
Chicago, R. I. & P. Ry. Co., Thomas v 110
Churchman v. Kansas City 366
City of Monett, Negrotto v 286
City of Mexico, Hunter v 17
City of Sedalia v. Gallie 392
City of Springfield to use v. Knott 612
City of St. Joseph, Gehling v .. 430
Clapton v. Taylor 117
Clark, Dodson v 148
Clayton, Robards v 608
Cleaton v. Emery 345
Cohick, Lee v 188
Colburn & Hamilton v. Brunswick Flour Co 415
Cole & Rodgers, Whitehead v .. 428
Compton, Duke v 304
Cooke v. McNeil 81
Corder, Herring v 378
Craig v. Kelly 312
Cramer v. Akin 163
Crigler v. Standard Fire Ins. Co 11
Cummings v. Hurd 139

D

Daggs, Hohstadt v 157
Daly, State v 184
Davis v. Johnson 240
Davis, Leahy v 519
Devore v. Staeckler 547
Dingle v. Pollick 479
Dodson v. Clark 148
Donahue v. Bragg 273
Duke v. Compton 304
Dwelling-House Ins. Co., Trabue v 331

E

Eddy, Bartlett v 32
Emery, Cleaton v 345
Edmonston v. Wilson 491
English v. Seibert 563
Equitable Mortgage Co., Milstead v 191
Evans, Harrington v 372

F

Faires, Schroeder v 470
Forsythe, Lockart v 654
Fry, Blackwell v 638

G

Gallie, City of Sedalia v 392
Gant v. Gant 3
Gehling v. City of St. Joseph .. 430
Greenlee v. Marquis 290
Gwin's Estate, Samuels v 8
Gwin v. Smur 361

Digitized by Google

H

Haeussler v. Holman Paper-Box Co 631
Harkness & Russell, Jewell Pure Water Co. v......... 357
Harrigan v. Welch........... 496
Harrington v. Evans.......... 372
Havens v. Lawton............ 1
Haycroft, State v............ 488
Headley, Perkins v........... 556
Heckart, State to use v....... 280
Herring v. Corder............ 378
Hibler, Bunker v.......... 536
Hiles v. Rule 628
Hill v. Mo. Pac. Ry. Co....... 520
Hitt, Tudor Iron Works v..... 472
Hohstadt v. Daggs.......... 157
Holman Paper-Box Co, Haeussler v 631
Holmes Street Ry. Co., Pratt v. 63
Hopkins, Vanstone v......... 386
Hull, Brick & Terra Cotta Co. v. 433
Hunkler, Kelm v............. 664
Hunter v. City of Mexico...... 17
Hurd, Cummings v........... 139

I

Ilgenfritz v. Ilgenfritz....... 127

J

Jewell Pure Water Co. v. Harkness & Russell........... 357
Johnson, Davis v............. 240
Johnson, Kidd v............. 486
Johnson-Frazier Lumber Co. v. Schuler & Muench........ 90

K

Kansas City, Churchman v.... 366
Kansas City v. Neal.......... 72
Kansas City, F. S. & M. Ry. Co., Walton v............ 620
Kansas City, St. J. & C. B. Ry. Co., Smith v............. 54
Kelly, Craig v............... 312
Kelm v. Hunkler............. 664
Kidd v. Johnson........... 486
Knott, City of Springfield to use v.................. 612
Krull, Ward v............... 447

L

Lamb v. Bush............... 337
Lawton, Havens v........... 1
Leahy v. Davis 519
Lee v. Cohick............... 188
Lockart v. Forsythe.......... 654
Long v. Noe 19
Lowrie v. Zunkel............ 153

M

Mansur v. Murphy............ 266
Marquis, Greenlee v.......... 290
Martin v. The Ashland Mill Co. 23
Masterson v. Chicago, R. I. & P. Ry. Co............... 6
Matheis, State v............ 237
McInturff, Baker v........... 505
McKee v. St. Louis, K. & N. W. Ry. Co................... 174
McLain, State v.............. 398
McNeil, Cooke v............. 81
Meagher, State v 571
Merritt, Sturgeon v........... 160
Mexico (City of), Hunter v... 17
Milstead v. Equitable Mortgage Co...................... 191
Mo. Pac. Ry. Co., Hill v...... 520
Monett (City of), Negrotto v.. 286
Moser, West v.............. 201
Murphy, Mansur v............ 266
Murphy, State v............ 270
Murray, Sherrell v.......... 233

N

Neal, Kansas City v.......... 72
Neal v. Smith................ 328
Negrotto v. City of Monett.... 286
Nichols v. Carter............. 401
Noe, Long v................. 19

P

Perkins v. Headley........... 556
Phillips, Carter v............. 319
Phillips, State v.............. 325
Phœnix Ins. Co., Beckman v.. 343
Phœnix Ins. Co., Beckman v.. 604
Phœnix Ins. Co., Steinberg v.. 255
Pickel Marble & Granite Co., Voegeli v................. 643
Pinnell v. St. Louis, A. & T. Ry. Co.............. 170
Point Pleasant, Walker v..... 244
Pollick, Dingle v............ 479
Pollock, State v............. 445
Pratt v. Holmes Street Ry. Co. 63

Q

Quincy, O. & K. C. Ry. Co., Richmond v 104
Quincy, O. & K. C. Ry. Co., Roberts v............. 164
Quinn, State v.............. 602

R

Richmond v. Quincy, O. & K. C. Ry. Co 104

Riley, Scott v. 251
Robards v. Clayton 608
Roberts v. Quincy, O. & K. C. Ry. Co 164
Rule, Hiles v 628

S

Samuels v. Gwin's Estate 8
Sauer v. Behr 86
Schroeder v. Faires 470
Schuler & Muench, Johnson-Frazier Lumber Co. v 90
Scott v. Riley 251
Sedalia (City of) v. Gallie 392
Seibert, English v 563
Sherrell v. Murray 233
Smith v. Kansas City, St. J. & C. B. Ry. Co 54
Smith, Neal v 328
Smith, Frazier Boot & Shoe Co. v. Western Union Tel. Co. 99
Smur, Gwin v 361
Sprague v. Western Home Ins. Co 423
Springfield to use v. Knott 612
Staeckler v. Devore 547
Standard Fire Ins. Co. v. Crigler 11
State v. Cassity 300
State v. Cassity 302
State v. Caughron 311
State v. Daly 184
State v. Haycroft 488
State v. Matheis 237
State v. Meagher 571
State v. McLain 398
State v. Murphy 270
State v. Phillips 325
State v. Pollock 445
State v. Quinn 602
State v. Webb 407
State v. Wiley 269
State v. Yockey 443
State ex rel. v. Chaney 511
State to use v. Heckart 280
Steele v. Byrd 419
Steinberg v. Phœnix Ins. Co 255
St. Joseph (City of), Gehling v. 430
St. Louis, A. & T. Ry. Co., Pinnell v 170
St. Louis, K. & N. W. Ry. Co., McKee v 174
St. Louis, K. & N. W. Ry. Co., Whitesides v 250
Sturgeon v. Merritt 160

T

Taylor, Clapton v 117
Thomas v. Chicago, R. I. & P. Ry. Co 110
Trabue v. Dwelling-House Ins. Co 331
Trorlicht, Bartley v 214
Tudor Iron Works v. Hitt 472

U

University Land Co., White v 450

V

Vandyke v. Walker 381
Vanstone v. Hopkins 386
Voegeli v. Pickel Marble & Granite Co 643

W

Walker v. Point Pleasant 244
Walker, Vandyke v 381
Walton v. Kansas City, F. S. & M. Ry. Co 620
Ward v. Krull 447
Webb, State v 407
Welch, Harrigan v 496
West v. Moser 201
Western Home Ins. Co., Sprague v 423
Western Union Tel. Co., Smith-Frazier B. & S. Co. v 99
White v. University Land Co 450
Whitehead v. Cole & Rodgers 428
Whitesides v. St. Louis, K. & N. W. Ry. Co 250
Whitlock v. Appleby 295
Wiley, State v 269
Wilson, Edmonston v 491

Y

Yockey, State v 443

Z

Zunkel, Lowrie v 153

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TABLE OF CASES CITED.

A

Abbott v. Lindenbauer	42 Mo. 162	397
Adams v. Leip	71 Mo. 597	506
Adler v. Anderson	42 Mo. App. 189	61
Adler v. Railroad	92 Mo. 242	209
Allen v. Brown	5 Mo. 323	606
Allen v. Richmond College	41 Mo. 302	323
Allison v. Darton	24 Mo. 343	405
American Ins. Co. v. Neiberger	74 Mo. 167	265
Anderson v. McPike	41 Mo. App. 328	276, 280
Andrews v. McPike	86 Mo. 293	47
Arnholt v. Hartwig	73 Mo. 485	294
Ashburn v. Ayres	23 Mo. 77	97
Atkinson v. Henry	80 Mo. 157	265

B

Backenstoe v. Railroad	86 Mo. 492	251
Bailey v. Wilson	29 Mo. 21	405, 406
Bambrick v. Campbell	37 Mo. App. 460	284
Bank v. Landis	34 Mo. App. 433	419
Barker v. Railroad	98 Mo. 50	533
Barnard v. Ins. C.	38 Mo. App. 114	428
Barnes v. Ins. Co	30 Mo. App. 550	428
Bauer v. Cabanne	11 Mo. App. 114	430
Basye v. Ambrose	32 Mo. 484	607
Bates v. Bower	17 Mo. 550	405
Bates v. Martin	3 Mo. 367	40, 52
Bayless v. Lafaivre	37 Mo. 119	253
Bean v. County Court	33 Mo. App. 622	414
Beaudean v. City of Cape Girardeau	71 Mo. 392	250
Benne v. Schnecko	100 Mo. 258	114
Bidault v. Wales	19 Mo. 36; 20 Mo. 550	641
Biggerstaff v. Railroad	60 Mo. 567	172
Bingham v. Birmingham	103 Mo. 345	322
Bird v. Railroad	30 Mo. App. 365	183
Boggs v. Railroad	18 Mo. App. 274	535
Bonine v. City of Richmond	75 Mo. 437	248
Bobb v. Woodward	42 Mo. 482	98
Booker v. Armstrong	93 Mo. 58	51
Boone v. Railroad	20 Mo. App. 232	529
Borgraefe v. Knights of Honor	22 Mo. App. 148	627
Boyd v. Furniture Co.	38 Mo. App. 210	62
Bradford v. Floyd	80 Mo. 207	534
Branson v. Turner	77 Mo. 493	10
Brant v. Robertson	16 Mo. 129	465
Brashears v. Strock	46 Mo. 221	338
Braxton v. Railroad	77 Mo. 755	530

Digitized by Google

Brennan v. City of St. Louis	92 Mo. 488	248
Brooks v. Jameson	55 Mo. 505	145
Brown v. Gummersell	30 Mo. App. 341	544
Brown v. Miller	46 Mo. App. 1	365
Brown v. Railroad	66 Mo. 588	589
Brown v. Strumple	21 Mo. App. 238	32
Brown v. Welden	27 Mo. App. 251	10
Buesching v. Gas Co	73 Mo. 229	370
Bullene v. Barnett	87 Mo. 189	88
Burgess v. Hitt	21 Mo. App. 313	377
Burke v. Adams	80 Mo. 504	509
Burns v. Wilson	17 Mo. App. 179	583
Busby v. Railroad	81 Mo. 43	533
Butler v. Lawson	72 Mo. 227	97

C

Card v. Ins. Co	4 Mo. App. 424	334
Calvert v. Railroad	34 Mo. 243	526
Calvert v. Railroad	38 Mo. 467	527
Campbell v. Gas Co	84 Mo. 352	47
Cape Girardeau v. Fougeau	30 Mo. App. 551	617
Case v. Garton	33 Mo. App. 597	207
Casey v. State	6 Mo. 646	577
Cattell v. Publishing Co	88 Mo. 356	605
Chapman v. Dougherty	87 Mo. 617	254
Chinn v. Davis	21 Mo. App. 73	583
Chouteau v. Allen	74 Mo. 56	515
Chouteau v. Goddin	39 Mo. 230	148
Chouteau v. Iron Works	94 Mo. 388	584
Christopher v. White	42 Mo. App. 429	418
Churchman v. Kansas City	44 Mo. App. 665	369
City v. Clark	68 Mo. 588	81
City v. Knox	74 Mo. 79	81
City of Kansas v. O'Connor	36 Mo. App. 594	80
City of St. Louis v. Rankin	96 Mo. 506	398
City to use v. Clemens	49 Mo. 552	397
Cole v. Skrainka	105 Mo. 309	126, 618
Cooper v. Duncan	20 Mo. App. 399	485
Cousins v. Railroad	66 Mo. 572	654
Craig v. Van Bebber	100 Mo. 585	565
Crook v. Ins. Co	38 Mo. App. 582	336
Clark v. Hammerle	27 Mo. 70	650
Clark v. Loan Co.	46 Mo. App. 248	369
Clerk's Savings Bank v. Thomas	2 Mo. App. 367	606
Clotworthy v. Railroad	80 Mo. 320	108
Clowers v. Railroad	21 Mo. App. 213	232
Clusky v. St. Louis	50 Mo. 89	587
Clyce v. Anderson	49 Mo. 41	484

D

Dahlgreen v. Yocum	44 Mo. App. 277	338
Dameron v. Jameson	71 Mo. 97	630
Davis v. Knapp	8 Mo. 657	544
Davis v. Railroad	19 Mo. App. 425	533
Dawson v. Dawson	37 Mo. App. 213	597
Dickson v. Railroad	71 Mo. 575	181
Dill v. Railroad	37 Mo. App. 454	401
Dodsin v. Clark	38 Mo. App. 150	149
Donnell v. Harshe	67 Mo. 170	659

Digitized by Google

Donnewald v. Turner	44 Mo. App. 352	84
Donovan v. Railroad	89 Mo. 147	370
Doss v. Railroad	50 Mo. 37	108
Dougherty v. Railroad	97 Mo. 647	651
Douglass v. Cisna	17 Mo. App. 44	88
Downing v. Boulier	21 Mo. 149	405
Dowzelot v. Rawlings	58 Mo. 75	586
Dreher v. Ins. Co.	18 Mo. 128	334
Duffy v. Railroad	19 Mo. App. 389	222
Dunkman v. Railroad	95 Mo. 244	533

E

Edwards v. Thomas	66 Mo. 468	145
Ehret v. Railroad	20 Mo. App. 251	168
Elfrank v. Seiler	54 Mo. 134	276
Ellis v. Kyes	47 Mo. App. 155	423
Eswin v. Railroad	96 Mo. 296	221
Ex parte Durbin	102 Mo. 100	238
Ex parte Hollwedell	74 Mo. 395	78, 79
Ewing v. Donnelly	20 Mo. App. 6	430

F

Fairgrieve v. Moberly	20 Mo. App. 142	370
Farber v. Railroad	32 Mo. App. 378	649
Farmers', etc., Bank v. Price	41 Mo. App. 291	88
Farrar v. Lyon	19 Mo. 123	405
Feurt v. Ambrose	34 Mo. App. 366	543, 542
Ferguson v. Turner	7 Mo. 497	569, 567
Finlay v. Bryson	84 Mo. 664	640
First Nat. Bank v. Coal Co	86 Mo. 125	285
Fitzgerald v. Hayward	50 Mo. 510	650
Forrester v. Scoville	51 Mo. 268	265
Foster v. Planing Mill Co	92 Mo. 90	466
Foster v. Railroad	90 Mo. 116	168
Fowler v. City of St. Joseph	37 Mo. 227	397
Fox v. Hall	74 Mo. 315	47
Fox v. Webster	46 Mo. 181	641
Franklin v. Globe	52 Mo. 461	145
Freeman v. Whitford	39 Mo. App. 311	147
Friesz v. Fallon	24 Mo. App. 439	627
Fruin v. Furniture Co	20 Mo. App. 313	98
Fulkerson v. Houts	55 Mo. 301	257
Fulkerson v. Thornton	68 Mo. 468	298
Funk v. Funk	35 Mo. App. 251	216

G

Gaines v. Fender	82 Mo. 507	397
Galbreath v. Newton	30 Mo. App. 380	126, 442
Garth v. Caldwell	72 Mo. 622	506
Garth v. Everett	16 Mo. 490	494
Gartside v. Nixon	43 Mo. 138	253
German Bank v. Stumpf	73 Mo. 311	127
Gibson v. Ziebig	24 Mo. App. 66	145
Gillett v. Wimer	23 Mo. 77	589
Gimbel v. Pignero	62 Mo. 240	97
Glenn v. Bergman	22 Mo. App. 346	356
Goetz v. Railroad	50 Mo. 574	650
Goodson v. Railroad	23 Mo. App. 76	418
Goodwin v. Railroad	75 Mo. 73	530

Digitized by Google

Gorman v. Railroad	26 Mo. 441	533
Granby Mining Co. v. Richards	95 Mo. 110	356
Gray v. Parker	38 Mo. 160	253
Green v. Costello	35 Mo. App. 127	555
Green v. Steinberg	15 Mo. App. 32	309
Green v. Von der Ahe	36 Mo. App. 398	210
Griffith v. Bailey	79 Mo. 472	516
Griffith v. Construction Co.	46 Mo. App. 539	390, 404
Grocery Co. v. Capen	23 Mo. App. 301	145
Groschke v. Bardenheimer	15 Mo. App. 353	544
Gunn v. Sinclair	52 Mo. 327	376
Gurley v. Railroad	93 Mo. 445	531
Gwin v. Smur	101 Mo. 550	364, 365

H

Hagerman v. Sutton	91 Mo. 519	50, 147
Hamilton v. Ins. Co.	94 Mo. 353	263
Harlan v. Railroad	65 Mo. 22	533
Harrison Wire Co. v. Hardware Co.	97 Mo. 289	390
Harvey v. Morris	63 Mo. 475	298
Haver v. Schwyhart	39 Mo. App. 303	316
Heald v. Grier	12 Mo. App. 556	534
Heath v. Powers	9 Mo. 774	41
Hellman v. Pollock	47 Mo. App. 205	494
Herndon v. Herndon	27 Mo. 421	494
Henson v. Railroad	34 Mo. App. 636	168
Herboth v. Gaal	47 Mo. App. 255	642
Hickerson v. City of Mexico	58 Mo. 65	206
Hilz v. Railroad	101 Mo. 54	533
Hines v. Amient	43 Mo. 298	476
Hisey v. Goodwin	90 Mo. 366	88
Hoffman v. Railroad	24 Mo. App. 546	532, 536
Holloway v. Ins. Co.	48 Mo. App. 1	336
Holton v. Railroad	50 Mo. 151	544
Hope v. Blair	105 Mo. 90	44
Horrigan v. Wellmuth	77 Mo. 542	324
Horstkotte v. Menier	50 Mo. 158	96, 98
Houseman v. Hope	20 Mo. App. 193	371
Howenstein v. Railroad	55 Mo. 33	533
Hucksold v. Railroad	90 Mo. 548	370
Hughes v. Railroad	66 Mo. 325	535
Hurck v. Erskine	50 Mo. 116	515
Hurt v. Salisbury	55 Mo. 310	356
Hyde v. Book & News Co.	32 Mo. App. 298	32
Hyde v. Larkin	35 Mo. App. 365	285, 361

I

Iba v. Railroad	45 Mo. 469	527, 528
Independence v. Moore	32 Mo. 392	78
In re Miller	44 Mo. App. 125	591

J

Jacoby v. O'Hearne	32 Mo. App. 566	268
James v. Clough	25 Mo. App. 147	243
Johnson v. Hodges	65 Mo. 589	257
Johnson v. Hoffman	53 Mo. 504	182

Digitized by Google

Johnson v. Johnson .... 81 Mo. 336 50
Johnson v. Railroad .... 96 Mo. 340 531
Jones v. Barnes .... 45 Mo. App. 590 449
Jones v. Christian .... 24 Mo. App. 540 257
Jones v. Packet Co .... 43 Mo. App. 398 647

K

Kankakee W'n Mills Co. v. Kampe 38 Mo. App. 229 .... 466, 468
Karl v. Railroad .... 55 Mo. 476 .... 108, 651
Kaulleen v. Tillman .... 69 Mo. 510 23
Keane v. Cushing .... 15 Mo. App. 96 126
Keary v. Baker .... 33 Mo. 603 376
Kelly v. Clancy .... 15 Mo. App. 519 22
Kelly v. Express Co .... 45 Mo. 428 589
Kelly v. Railroad .... 70 Mo. 604 107
Kelly v. Railroad .... 75 Mo. 138 533
Kendig v. Railroad .... 79 Mo. 207 532
Kenney v. Railroad .... 70 Mo. 252 298
Keown v. Vogel .... 25 Mo. App. 35 504
King v. Railroad .... 90 Mo. 520 251
Koeltz v. Bachman .... 46 Mo. 320 390
Koenig v. Morrison .... 44 Mo. App. 411 210
Krider v. Milner .... 99 Mo. 145 470

L

Lee v. Clark .... 89 Mo. 553 147
Lee v. St. Louis, etc., Co .... 6 Mo. 578 222
Leeser v. Boekhoff .... 38 Mo. App 419, 445
Lemay v. Railroad .... 105 Mo. 361 531
Lemoine v. Cook .... 36 Mo. App. 193 419
Leslie v. Railroad .... 88 Mo. 50 108
Lionberger v. Pohlman .... 16 Mo. App. 392 627
Lodge v. Samuels .... 50 Mo. 204 88
Louis v. Davis .... 3 Mo. 98 494
Lowenberg v. Bernd .... 47 Mo. 297 476
Lower v. Bank .... 78 Mo. 67 .... 567, 568
Luthey v. Woods .... 1 Mo. App. 168 466

M

Manheimer v. Harrington .... 20 Mo. App. 297 641
Mann v. Best .... 62 Mo. 401 47
Marshall v. Standard .... 24 Mo. App. 192 79
Martin v. Fewell .... 79 Mo. 401 356
Massengale v. Tel. Co .... 17 Mo. App. 257 103
Matson v. Calhoun .... 44 Mo. 368 476
McAllister v. Lawler .... 32 Mo. App. 91 506
McCartney v. Ins. Co .... 45 Mo. App. 379 542
McCause v. McClure .... 38 Mo. 410 544
McClurg v. Hill .... 7 Mo. App. 579 279
McDonald v. Cash .... 45 Mo. App. 66 371
McEvoy v. Lane .... 9 Mo. 48 544
McIntyre v. McIntyre .... 80 Mo. 470 377
McKelvy v. Wonderly .... 26 Mo. App. 631 98
McPherson v. Railroad .... 66 Mo. 103 360
McQuoid v. Lamp .... 19 Mo. App. 153 430
Meier v. Thieman .... 90 Mo. 433 254
Mellor v. Railroad .... 105 Mo. 455 .... 218, 221
Melvin v. Railroad .... 89 Mo. 106 298
Milburn v. Railroad .... 86 Mo. 104 251

Digitized by Google

Miller v. Brown	47 Mo. 504	191
Miller v. Davis	50 Mo. 572	377
Miller v. Wall	27 Mo. 441	518
Minter v. Railroad	82 Mo. 128	529
Missouri Fire Clay Works v. Ellison	30 Mo. App. 72	284
Missouri Pac. Ry. Co. v. McLiney	32 Mo. App. 176	268
Moon v. Minkler	3 Mo. App. 596	430
Moore v. Railroad	81 Mo. 499	168
Moran v. January	52 Mo. 523	606
Moran v. Plankington	64 Mo. 337	210
Morrisey v. Ferry Co.	43 Mo, 300	108
Mouts v. Shepherd	79 Mo. 144	484
Muehlhausen v. Railroad	91 Mo. 332	651
Munson v. Eddy	94 Mo. 504	47
Murdoch v. Finney	21 Mo. 139	53
Murdoch v. Hillyer	45 Mo. App. 287	97
Murphy v. DeFrance	101 Mo. 157	484
Musser v. Brink	68 Mo. 242	659
Musser v. Johnson	42 Mo. 74	284

N

Nance v. Railroad	79 Mo. 196	168
Napton v. Seaton	71 Mo. 358	323
National Bank v. Williams	46 Mo. 17	605
Nelson v. Railroad	68 Mo. 593	107
Newberger v. Friede	23 Mo. App. 631	659
Noll v. Oberhellman	20 Mo. App. 336	567
Northup v. Cook	39 Mo. 208	390
Norton v. Dorsey	65 Mo. 376	588
Norton v. Railroad	40 Mo. App. 643	3

O

Ober v. Carson	62 Mo. 209	31
O'Connor v. Railroad	94 Mo. 150	370
O'Flaherty v Railroad	45 Mo. 73	222
O'Leary v. Rowan	31 Mo. 117	219
Owens v. Railroad	95 Mo. 181	651
Oyster v. Oyster	32 Mo. App, 270	506

P

Parsons v. Railroad	94 Mo. 286	233 370
Pate v. Pate	6 Mo. App, 49	5
Paulette v. Brown	40 Mo. 52	589
Pembroke v. Railroad	30 Mo. App. 62	371
Pendergast v. Hodge	21 Mo. App. 138	377
Penninger v, Reilley	44 Mo. App. 255	340
Perkins v. Bakrow	45 Mo. App. 248	556, 558
Pier v. Heinrichshoffen	52 Mo. 333	607
Pierce v. Town of Lutesville	25 Mo. App. 317	247, 248
Pitkin v. Reibel	104 Mo. 505	322
Pope v. Railroad	99 Mo. 400	531
Porter v. Railroad	71 Mo. 76	232
Powell v. Camp	60 Mo. 569	376
Price v. Evans	49 Mo. 396	627
Price v. Ins. Co	48 Mo. App. 281	317
Price v. Railroad	72 Mo. 414	108
Priest v. Watson	75 Mo. 314	567, 569
Pugh v. Ayers	47 Mo. App. 590	258

Digitized by Google

Q

Quarles v. Porter	12 Mo. 76	544
Queen v. Castello, Adm'r,	35 Mo. App. 127	429

R

Ransom v. Cobb	67 Mo. 375	518
Railroad v. Campbell	62 Mo. 588	98
Railroad v. Carlisle	94 Mo. 166	419
Reed v. Pelletier	28 Mo. 177	88
Reilly v. Railroad	94 Mo. 600	648
Reinhart v. Soap Co	33 Mo. App. 24	360, 544
Rhodes v. Nevada	47 Mo. App. 499	19
Rice v. McFarland	34 Mo. App. 404	41, 43, 46
Rice v. Groffman	56 Mo. 434	294
Rice v. Morton	19 Mo. 263	567
Richards v. Griggs	16 Mo. 416	40
Rickey v. Ten Broeck	63 Mo. 563	390
Ridenhour v. Railroad	102 Mo. 287	221
Ridgeway v. Holliday	57 Mo. 444	47
Rine v. Railroad	100 Mo. 228	533
Roberts v. Railroad	43 Mo. App. 287	165
Robinson v. Walker	45 Mo. 117	430
Rogers v. Crow	40 Mo. 91	84
Rose v. Cobb	64 Mo. 464	518
Rosenburg v. Boyd	14 Mo. App. 429	339
Rothschild v. Frensdorf	21 Mo. App. 318	298
Ryan v. Kelly	9 Mo. App. 396	398
Ryors v. Prior	31 Mo. App. 561	276

S

Salmon v. Fewell	17 Mo. App. 118	506
Sawyer v. Railroad	37 Mo. 263	650
Saxton v. Beach	60 Mo. 488	617
Saxton v. St. Joseph	60 Mo. 153	617
Schaefer v. Causey	8 Mo. App. 142	325
Schneider v. Railroad	75 Mo. 295	531
Schroeder v. Michel	98 Mo. 43	651
Schultz v. Railroad	32 Mo. App. 438	419
Sharp v. Cheatham	88 Mo. 498	47
Sharp v. Knox	48 Mo. App. 169	145, 147
Shaw v. Railroad	104 Mo. 656	533
Sheehan v. Owen	82 Mo. 464	442, 618
Sheehy v. Railroad	94 Mo. 574	70
Shroyer v. Nickell	67 Mo. 589	515
Seiber v. Allen	61 Mo. 488	397
Sexton v. Hull	45 Mo. App. 339	21, 22
Sidekum v. Railroad	93 Mo. 400	419
Slowey v. McMurray	27 Mo. 113	464
Smith v. Busby	15 Mo. 387	298
Smith v. Haley	41 Mo. App. 611	330
Smith v. Heidecker	39 Mo. 157	544
Smith v. Rice	27 Mo. 505	567
Smith v. Sims	77 Mo. 274	484
Snider v. Express Co	77 Mo. 523	505, 504
Snyder v. Railroad	86 Mo. 616	284
Snyder v. Railroad	60 Mo. 413	649
Spencer v. Beasley	48 Mo. App. 97	429
Spohn v. Railroad	87 Mo. 74	627
Squires v. City of Chillicothe	89 Mo. 226	248

Digitized by Google

State v. Able	65 Mo. 37	591
State v. Alexander	66 Mo. 148	587
State v. Armstrong	16 S. W. Rep. 604	239
State v. Baker	71 Mo. 475	577, 576
State v. Barnes	59 Mo. 154	591
State v. Barnett	63 Mo. 300	591
State v. Bennett	102 Mo. 369	185, 188
State v. Brinkman	40 Mo. App. 284	272
State v. Brooks	92 Mo. 591	606
State v. Burk	89 Mo. 635	238
State v. Cassity	49 Mo. App. 300	603
State v. Cowan	29 Mo. 330	78
State v. Cushing	20 Mo. 215	589
State v. Dooley	64 Mo. 146	591
State v. Dwire	25 Mo. 553	589
State v. Durken	23 Mo. App. 387	577
State v. England	19 Mo. 388	272
State v. Fare	39 Mo. App. 110	272
State v, Gee	85 Mo. 647	589
State v. Geiger	45 Mo. App. 111	491, 591
State v. Glassner	7 Mo. App. 572	591
State v. Heckler	81 Mo. 417	577
State v. Hoffman	78 Mo. 256	591
State v. Hogan	31 Mo. 340	302
State v. Hosmer	85 Mo. 553	239
State v. Larkin	24 Mo. App. 410	447
State v. Martin	44 Mo. App. 45	301, 603
State v. Marshall	36 Mo. 400	606
State v. Mix	15 Mo. 153	589
State v. Nauert	2 Mo. App. 295	651
State v. Pace	33 Mo. App. 458	418
State v. Pagel	92 Mo. 300	419
State v. Pitts	58 Mo. 556	303
State v. Quinn	40 Mo. App. 573	576
State v. Reeves	97 Mo. 672	575
State v. Reilly	75 Mo. 521	577
State v. Roberts	39 Mo. App. 47	447
State v. Smith	24 Mo. App. 413	272
State v. Smith	90 Mo. 37	591
State v. Stout	31 Mo. 406	589
State v. Walker	24 Mo. App. 679	272
State v. Walker	16 Mo. App. 417	302
State v. Welch	28 Mo. 600	302
State ex rel. v. Brockman	39 Mo. App. 137	466
State ex rel. v. Chaney	36 Mo. App. 513	514
State ex rel. v. Heege	39 Mo. App. 50	249
State ex rel. v. Langdon	57 Mo. 350	518
State ex rel. v. Langdon	57 Mo. 353	518
State ex rel. v. McGrath	91 Mo. 386	124
State ex rel. v. Ruark	34 Mo. App. 325	412
State ex rel. v. Seddon	93 Mo. 520	594, 597, 599, 601
State ex rel. v. Shires	39 Mo. App. 560	485
State to use v. Blackman	51 Mo. 319	219
State to use v. McHale	16 Mo. App. 482	284
State to use v. Tasker	31 Mo. 445	88
St. Louis v. Bentz	11 Mo. 61	78
St. Louis v. Cafferata,	24 Mo. 94	78
St. Louis v. Schoenbusch	95 Mo. 618	78, 79
St. Louis Bldg. Ass'n v. Williams.	19 Mo. 612	405
St. Louis Perp. Ins. Co. v. Cohen.	9 Mo. 442	41, 52, 53

Digitized by Google

Steele v. Leonori.......... ..... 28 Mo. App. 675.................... 516
Steinman v. Strimple............ 29 Mo. App. 478. 97
Stevens v. City of Macon. ...... 83 Mo. 357........................ 370
Stevens v. Hume................ 62 Mo. 473........................ 47
Stewart v. Ball.................. 33 Mo. 156........................ 494
Stewart v. Caldwell............. 54 Mo. 539 484
Stewart v. City of Clinton....... 79 Mo. 603........................ 433
Stix v. Matthews............... 75 Mo. 96... 265
Stoffen v. Schroeder.... .... 62 Mo. 147........................ 47
Strauss v. Railroad.............. 75 Mo. 185....................107, 108
Sturgis v. Railroad.............. 75 Mo. 480.... 370
Sullivan v. Railroad.... .... 97 Mo. 117............ 531
Surgist v. Railroad.............. 75 Mo. 475.... 108
Sutter v. Streit.................. 21 Mo. 157........................ 405
Swartz v. Nicholson.... .... 65 Mo. 508........................ 339

T

Tesson v. Ins. Co............... 40 Mo. 33.......................... 264
Thomas v. Freligh.............. 9 Mo. App. 151............ 641
Thompson v. Boonville.......... 61 Mo. 282........ 433
Thompson v. Botts............. 8 Mo. 710......... .... 10, 11
Thompson v. Railroad........... 22 Mo. App. 327... 103
Town of Kirkwood v. Autenreith. 11 Mo. App. 515..... 577
Town of Kirkwood v. Autenreith. 21 Mo. App. 73............... .. 577
Travers v. Railroad... ... . 63 Mo. 421.. 654
Treadway v. Johnson............ 39 Mo. App. 176.................. 515
Turner v. Kerr.................. 44 Mo. 429................... ... 464
Turner v. Railroad...... ...... 78 Mo. 578........................ 533

U

Union Bank v. Dillon............ 75Mo. 380........................ 544
Union Railroad & Transit Co. v. Traube........ .... 59 Mo. 363...............209, 210, 211
Union Railway & Transit Co. v. Skinner......... .... 9 Mo. App. 189.................. 324

V

Valle v. Fleming......... ...... 29 Mo. 152................... 325
Van Hoozier v. Railroad........ 70 Mo. 145...... .... 180, 182
Vaughan v. Railroad............ 34 Mo. App. 141.................. 168

W

Wallace v. Railroad............ 74 Mo. 594 532
Walser v. Graham............... 45 Mo. App. 629.................. 375
Walsh v. Trans. Co.............. 52 Mo. 434.... 32
Walter v. Railroad.............. 83 Mo. 608. 108
Walton v. Railroad.............. 40 Mo. App. 544............ 621, 623
Waters v. Waters............... 49 Mo. 385.....................598, 599
Webbing v. Powers............. 25 Mo. 599....................... 97
Welch v. Railroad.............. 20 Mo. App. 477...... ......532, 536
Welsh v. St. Louis.............. 73 Mo. 71......... 606
Werth v. Springfield............ 78 Mo. 109; 22 Mo. App. 12....... 433
Werz v. Werz.... .... 11 Mo. App. 26................... 5
Wescott v. Budwell............. 40 Mo. 146....................... 97
Wheat v. State................. 6 Mo. 458 302
Wheeler v. Metropolitan Co...... 23 Mo. App. 190 145
White v. Middlemarch .... 42 Mo. App. 368.................. 401
White v. Saulsbury............. 33 Mo. 150.... 390

Digitized by Google

White v. Shell	84 Mo. 569	322
White v. Storms	21 Mo. App. 288	494
Whitstone v. McCartney	32 Mo. App. 430	449
Williams v. Railroad	96 Mo. 283	221
Wilson v. Drumrite	21 Mo. 325	464
Wilson v. Railroad	18 Mo. App. 258	168
Wood v. Augustine	61 Mo. 51	51
Workman v. Campbell	46 Mo. 305	243
Wyatt v. Railroad	55 Mo. 435	108

Y

Young v. Powell	87 Mo. 128	542

Digitized by Google

TABLE OF STATUTES CITED.

Administration, R. S. 1889, sec. 213 484
Assignments, R. S. 1825, p. 143 52
Attachment, R. S. 1889, sec. 521 89
Attorneys, Prosecuting, R. S. 1889, secs. 662, 663, 664, 665 186

Bills of Exchange, R. S. 1889, secs. 733, 735 ....155, 156
Bonds & Notes, R. S. 1835, p. 105 53
Bonds & Notes, R. S. 1845, p. 190 53
Bonds & Notes, R. S. 1855, p. 322 53
Bonds & Notes, Acts, 1849, p. 75, sec. 3 53

Cities, Towns and Villages, R. S. 1889, sec. 1270 438
Cities, Towns and Villages, R. S. 1889, secs. 1404, 1405, 1406 438
Cities, Towns and Villages, R. S. 1889, sec. 1495..614, 616
Cities, Towns and Villages, R. S. 1889, secs. 1496, 1497. 614
Cities, Towns and Villages, R. S. 1889, sec. 1498..614, 615
Cities, Towns and Villages, R. S. 1889, sec. 1514..395, 396
Cities, Towns and Villages, R. S. 1889, sec. 1524 ....395, 396, 397
Cities, Towns and Villages, R. S. 1889, sec. 1589,..... 288
Cities, Towns and Villages, R. S. 1889, secs. 1674, 1677. 249
Code of Civil Procedure, R. S. 1889, sec. 1991 504
Code of Civil Procedure, R. S. 1889, sec. 1996 138
Code of Civil Procedure, R. S. 1889, sec. 2038 98
Code of Civil Procedure, R. S. 1889, sec. 2047. .. ...98, 276
Code of Civil Procedure, R. S. 1889, sec. 2135 404
Code of Civil Procedure, R. S. 1889, sec. 2155 79
Code of Civil Procedure, R. S. 1889, sec. 2186 248
Code of Civil Procedure, R. S. 1889, sec. 2191 62
Code of Civil Procedure, R. S. 1889, secs. 2229, 2231 61
Code of Civil Procedure, R. S. 1889, sec. 2253 157
Code of Civil Procedure, R. S. 1889, sec. 2304 515
Code of Civil Procedure, Acts of 1849, p. 90 404
Code of Civil Procedure, Session Acts, 1891, p. 69 344
Constables, R. S. 1889, sec. 2380 447
Contracts, R. S. 1889, sec. 2390. 41
Corporations, Private, R. S. 1889, sec. 2611 .... .165, 171
Corporations, Private, R. S. 1889, sec. 2768 349
Costs in Civil Cases, R. S. 1889, secs. 2920, 2935 377
Crimes and Punishments, R. S. 1889, sec. 3485 79
Crimes and Punishments, R. S. 1889, sec. 3502...271, 272, 446
Crimes and Punishments, R. S. 1889, sec. 3784 490
Crimes and Punishments, R. S. 1889, sec. 3798 325
Crimes and Punishments, R. S. 1889, sec. 3841 78
Crimes and Punishments, R. S. 1889, sec. 3872 239
Crimes and Punishments, R. S. 1889, sec. 3949 185
Crimes and Punishments, R. S. 1889, sec. 4002 302
Crimes and Punishments, Laws of 1887, p. 354 185
Criminal Cases, Practice, R. S. 1889, sec. 4058 185

Digitized by Google

Criminal Cases, Practice, R. S. 1889, sec. 4115........272, 301
Criminal Cases, Practice, R. S. 1889, sec. 4208........ 239
Criminal Cases, Practice, R. S. 1889, sec. 4275........ 603
Criminal Cases, Practice, R. S. 1889, sec. 4297........ 326

Damages, R. S. 1889, secs. 4428, 4429........525, 530
Divorce, R. S. 1889, sec. 4501. 5
Dramshops, R. S. 1889, sec. 4575........ 303
Dramshops, R. S. 1889, sec. 4588........ 400
Dramshops, R. S. 1889, sec. 4598........ 410
Druggists, R. S. 1889, sec. 4621........301, 303

Executions, R. S. 1889, sec. 4908........ 516

Forcible Entry, R. S. 1889, secs. 5120, 5121........21, 22
Forcible Entry, R. S. 1889, secs. 5129, 5131, 5141..... 376

Justices' Courts, R. S. 1889, sec. 6126........ 251
Justices' Courts, R. S. 1889, sec. 6136........ 422
Justices' Courts, R. S. 1889, sec. 6138........ 548
Justices' Courts, R. S. 1889, sec. 6160........ 422
Justices' Courts, R. S. 1889, sec. 6162........ 98
Justices' Courts, R. S. 1889, sec. 6163........ 93
Justices' Courts, R. S. 1889, sec. 6164........ 98
Justices' Courts, R. S. 1889, sec. 6317........ 518
Justices' Courts, R. S. 1889, sec. 6328..77, 80, 551, 553, 671
Justices' Courts, R. S. 1889, sec. 6329........77, 80
Justices' Courts, R. S. 1889, sec. 6330.....429, 551, 671
Justices' Courts, R. S. 1889, sec. 6331........ 672
Justices' Courts, R. S. 1889, sec. 6332, 6333....552, 555, 672
Justices' Courts, R. S. 1889, sec. 6334........552, 672
Justices' Courts, R. S. 1889, sec. 6340........550, 554
Justices' Courts, R. S. 1889, sec. 6344........ 423
Justices' Courts, R. S. 1889, sec. 6349........ 376
Justices' Courts, R. S. 1879, sec. 3029........517, 518
Justices' Courts, R. S. 1879, sec. 3032........ 517
Justices' Courts, R. S. 1879, sec. 3043........ 429

Landlord and Tenant, R. S. 1889, sec. 6392........308, 310
Landlord and Tenant, R. S. 1889, sec. 6394........ 309
Landlord and Tenant, R. S. 1889, sec. 6397...308, 309, 310
Landlord and Tenant, R. S. 1889, sec. 6398........309
Landlord and Tenant, R. S. 1889, sec. 6399........ 310
Lands, R. S. 1889, sec. 6549... 77
Laws, R. S. 1889, sec. 6607... 288
Liens, R. S. 1889, sec. 6705... 84
Liens, R. S. 1889, sec. 6713... 96
Liens, R. S. 1889, sec. 6725... 96
Liens, R. S. 1889, sec. 6732... 162
Liens, R. S. 1889, sec. 6759... 293

Married Women, R. S. 1889, sec. 6869........ 135
Married Women, R. S. 1889, sec. 6864........ 138
Mortgages, R. S. 1889, secs. 7094, 7095........ 149
Mortgages, R. S. 1879, secs. 3311, 3312........ 149

Partition, R. S. 1889, sec. 7135. 630

Replevin, R. S. 1889, sec. 7490. 380

Set-off, R. S. 1889, sec. 8161........41, 49, 52, 53
Set-off, R. S. 1865, p. 602..... 53
Shows and Circuses, R. S. 1889, sec. 8193........288, 289
St. Louis Court of Criminal Correction, R. S. 1889, sec. 3, p. 2152........ 187
St. Louis Court of Criminal Correction, R. S. 1889, sec. 8, p. 2153........ 187
St. Louis Court of Criminal Correction, R. S. 1889, sec. 1819, p. 2155........ 187

Vagrants, R. S. 1889, secs. 8846, 8847........ 78

Witnesses, R. S. 1889, sec. 8918. 254

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CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS.

MARCH TERM, 1892.

JOSEPH D. HAVENS, Respondent, v. WILLIAM A. LAWTON, Appellant.

Kansas City Court of Appeals, April 4, 1892.

Practice, Appellate: MATTERS NOT IN THE BILL OF EXCEPTIONS. Where matters, such as improper remarks of counsel at the argument, and affidavits in support of the motion for a new trial, do not appear in the bill of exceptions, the appellate court cannot notice them.

Appeal from the Clay Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

Beebe & Watson, for appellant.

The remark of plaintiff's counsel, in referring to the change of venue taken by defendant, was error. *Brown v. Railroad*, 66 Mo. 58; *Ritter v. Bank*, 87 Mo. 574; *Marble v. Walters*, 19 Mo. App. 134; *Gibson v. Zeibig*, 24 Mo. App. 373; *Koch v. Hebel*, 32 Mo. App. 103; *McDonald & Co. v. Cash*, 45 Mo. App. 66.

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Gage, Ladd & Small, for respondent.

The judgment should not be reversed on account of the remarks of counsel in argument. Record of the occurrences complained of is not preserved in the bill of exceptions, but only in affidavits filed upon the motion for a new trial. These cannot be considered in this court. *Roeder v. Studt*, 12 Mo. App. 566; *State v. Carter*, 98 Mo. 179; *State v. Pagels*, 92 Mo. 311; *State v. McDaniel*, 94 Mo. 306; *Loyd v. Railroad*, 53 Mo. 509; *State v. Hayes*, 81 Mo. 577; *State v. Musick*, 101 Mo. 273; *Norton v. Railroad*, 40 Mo. App. 642.

Gill, J.—Plaintiff sued defendant on seven promissory notes of $200 each, executed by defendant, and payable to the plaintiff, each purporting on its face to bear interest from date at the rate of ten per cent. The defense was that plaintiff had altered the notes after their execution; that they were written and signed to carry interest from maturity, and that plaintiff, without defendant's consent, had erased the word *maturity* in each note and inserted *date*, thereby making the notes bear interest from date rather than maturity. In reply to this charge plaintiff testified that the notes were made and signed from some blanks wherein *maturity* was printed, and by mistake the parties neglected to erase this and insert *date*, which was the intention of the parties; but that after leaving defendant's office (and less than hour) plaintiff discovered the error, returned forthwith to defendant, who then authorized plaintiff to make the correction, which was done at once. This was denied by the defendant. Upon this issue the case was tried before a jury, under instructions from the court; plaintiff secured a verdict and judgment in his favor, and defendant appealed.

There is in fact but one matter urged for reversal. It is claimed that, in the argument at the close of the

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trial, plaintiff's counsel went outside of the record and stated to the jury irrelevant and prejudicial matter.

As to this, it is sufficient to say that the bill of exceptions fails to contain, upon the indorsement of the trial judge, any statement of the objectionable matter. The matter set out in the motion for new trial—coming as it does from one of the litigants, but not settled and stated by the court—does not bear that stamp of authenticity that justifies our attention here. The same remark applies to the affidavits filed in support of the motion for new trial. It is the duty of the trial court in cases of this kind, as in all others, to recite the occurrences at the trial over the certificate and seal of the court, and by such recitals we are alone controlled. It would be a very unsafe practice to permit disappointed litigants thus to bring up additions to the bill of exceptions which the court had failed or refused to include. It has been repeatedly so held by the appellate court of this state. *Norton v. Railroad*, 40 Mo. App. 643, and other decisions cited in plaintiff's brief. There is no error in the record, and the judgment is affirmed. All concur.

NANNIE F. GANT, Respondent, v. W. F. GANT, Appellant.

Kansas City Court of Appeals, April 4, 1892.

Divorce: PLEADING: ALLEGATION OF RESIDENT OF COUNTY. In a petition for divorce it is not necessary to allege that plaintiff is a resident of the county in which the action was begun. (*Denying Pate v. Pate*, 6 Mo. App. 49.)

Appeal from the Clay Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

TRANSFERRED TO SUPREME COURT.

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Deatherage & Young, for appellant.

Plaintiff must allege in her petition that she is a resident of the county where suit is brought, and be a resident of the county in order to give the court jurisdiction. R. S. 1889, sec. 4501; *Pate v. Pate*, 6 Mo. App. 49; *Cole v. Cole*, 3 Mo. App. 571. The petition in this case does not state plaintiff was a resident of Ray county, where suit was brought.

C. T. Garner, *J. E. Ball* and *T. N. Lavelock*, for respondent.

(1) The statute provides that a suit for divorce must be instituted in the county where the plaintiff resides; but this was merely intended to prescribe the venue, a statement of which need not be embraced in the body of the petition. R. S. 1889, sec. 4501; *Werz v. Werz*, 11 Mo. App. 30. (2) The jurisdiction of a court of general powers is presumed until the contrary is shown. Brown on Jurisdiction, sec. 20, p. 52; *Werz v. Werz*, 11 Mo. App. 30; *Adams v. Cowles*, 95 Mo. 501.

Gill, J.—This is an action for divorce on the ground of cruel and barbarous treatment, and such as to render the condition of the plaintiff as wife of the defendant intolerable. The court below granted the prayer of the petition, and awarded a judgment for $1,000 alimony, and defendant has appealed.

When the case was called for trial the defendant interposed an objection to the introduction of any evidence, for the alleged reason that the petition fails to state that plaintiff was a resident of the county wherein the action was begun. The court overruled the objection, to which exception was saved; and this presents the question now for determination.

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The court of appeals at St. Louis, in *Pate v. Pate* (6 Mo. App. 49), held that the failure of the plaintiff to allege in the petition that plaintiff then resided in the county where the suit was brought was fatal, and sustained the trial court's action in dismissing the case on account of the absence of such allegation. And, though this ruling was in a subsequent case (*Werz v. Werz*, 11 Mo. App. 26) somewhat questioned by Judge THOMPSON, it still remains unimpeached in that court. The foundation of this holding is that the provision of the divorce law (R. S. 1889, sec. 4501), which provides that "the proceedings shall be had in the county where the plaintiff resides," creates a jurisdictorial fact which must be set out in the petition.

We do not concur with the St. Louis court on this question. The practice in this state has been quite uniform to allege only the residence in the state for one whole year next preceding the filing of the petition, but it has never been supposed necessary, we think, to allege that the plaintiff resided in the county. The statutory provision that the suit for divorce should be instituted in the court of the plaintiff's residence was only intended to prescribe the venue, a statement of which need not be alleged in the body of the petition. We call attention to the remarks of Judge THOMPSON in the *Werz case*, *supra*, where good reasons, we think, are expressed against the decision of the same court in *Pate v. Pate*.

Owing then to this conflict in opinion, and following the constitutional mandate, we order this cause transferred to the supreme court for determination.

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49 6 | 58 574 ALVIN P. MASTERSON, Appellant, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, April 4, 1892.

Contributory Negligence: "STOP": "LOOK AND LISTEN": JURY QUESTION. **Though the injury and defendant's negligence are conceded and the testimony strongly preponderates against plaintiff on his contributory negligence, yet, if the plaintiff testifies that before crossing the track he slowed up his buggy till it did not prevent his hearing all he could have heard if he had come to a full stop, the case should go to the jury.**

Appeal from the Clinton Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

REVERSED AND REMANDED.

Samuel Hardwicke and *Claude Hardwicke*, for appellant.

It is contended that, because plaintiff did not "stop and look and listen," he cannot recover in this case. The following are some of the cases in this state which are relied on for that doctrine: *Fletcher v. Railroad*, 64 Mo. 484; *Harlan v. Railroad*, 65 Mo. 22; *Henze v. Railroad*, 71 Mo. 636; *Purl v. Railroad*, 72 Mo. 168; *Turner v. Railroad*, 74 Mo. 602; *Hixson v. Railroad*, 80 Mo. 335; *Donohue v. Railroad*, 91 Mo. 357, and other cases. There is no question that the company was negligent in moving the train without ringing the bell or sounding the whistle. But it is contended that as the plaintiff was negligent in not stopping, that negligence defeats his recovery in this case. But, in order to defeat his recovery, that injury must have been caused by his negligence. This is distinctly recognized in all the Missouri cases cited. *Engenheim v. Railroad*, 66 Mich. 158; 33 N. W. Rep. 161; *Dolan v. Canal Co.*, 71 N. Y. 285.

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M. A. Lowe, *W. F. Evans* and *Thos. E. Turney*, for respondent.

The undisputed evidence shows that the plaintiff approached the place of the collision without the exercise of any care or prudence, and that the collision was caused by his own negligence and want of care. If his view of the track and train was obstructed, he should have exercised the increased care demanded by the situation. The precautions necessary in a given case to avoid injury depend largely upon the hazards of the situation. If the view is obstructed, the necessity for exercising the sense of hearing is thereby increased. *Kelly v. Railroad*, 88 Mo. 534, 546; *Henze v. Railroad*, 71 Mo. 636, 640; *Turner v. Railroad*, 74 Mo. 602; *Fletcher v. Railroad*, 64 Mo. 484.

Ellison, J.—Plaintiff sues for injury to his horse, buggy and harness. A demurrer to his testimony was sustained and he comes here for relief.

From the record presented we have concluded that the trial court erred in taking the case from the jury. There is strong testimony showing contributory negligence, but *all* the testimony is not of that kind. If the testimony of plaintiff himself is to be believed, he should recover. He states that before crossing the tracks he checked his horse to a slow gait; that he looked and listened; that, while he did not stop his team, yet the buggy was making *no noise*, and did not prevent his hearing all he could have heard if he had come to a full stop. The injury and the defendant's negligence is conceded; the testimony strongly preponderates against plaintiff on his contributory negligence, but not altogether so. We will reverse the judgment, and remand the cause that plaintiff may take the verdict of a jury on his case. All concur.

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49 8 | 63 520 | 49 8 | 89 571

J. C. Samuels, Appellant, v. Guin's Estate, Respondent.

Kansas City Court of Appeals, April 4, 1892.

Warranty: PATENT DEFECTS: INTENTION. The general rule that a general warranty of soundness does not cover patent defects, nor defects known to the buyer, is limited by the rule that the real intention of the parties must govern in the construction of contracts, and the vendor may in express terms warrant against obvious defects, as where the condition of a horse's eyes are peculiar and a matter of doubt the vendor binds himself by declaring "they are sound as dollars;" "I guarantee him sound in every respect."

Appeal from the Audrain Circuit Court.—Hon. E. M. Hughes, Judge.

Reversed and remanded.

W. T. Austin and *Geo. Robertson*, for appellant.

A general warranty of soundness, as a rule, will not be held to include patent defects, known to the buyer, but where such defect is observed by the buyer, and the soundness of the animal questioned, as in this case, and the seller expressly warrants that the apparently defective marks are sound, as in this case, and thereby misleads the buyer and induces the sale, the seller is held on such express warranty. The court, therefore, erred in refusing plaintiff's instructions, numbered 1 and 2. *Branson v. Turner*, 77 Mo. 493; *Brown v. Weldon*, 27 Mo. App. 260; *Wade v. Scott*, 7 Mo. 509; *Thompson v. Botts*, 8 Mo. 710; *Kirtland v. Jennings*, 6 Mo. 61; *Watson v. Roode*, 46 N. W. Rep. 491; *Pinney v. Andrews*, 41 Vt. 663; 1 Parsons on Contracts [7 Ed.] sec. 576, note *h*, foot p. 617, and authorities cited; 2 Schouler on Personal Property [2 Ed.] par. 339; 2 Benjamin on Sales [Am. & Eng. Ed.] secs. 938, 939, p. 818.

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F. P. Wiley, for respondent.

Gill, J.—In the summer of 1890 the deceased Guin sold to the plaintiff Samuels a horse which was warranted by Guin to be sound in every respect, particularly warranting that the horse's eyes were sound. At the time the negotiation was had, and when the horse was being examined, something was said as to an apparent defect in the horse's eyes. Thereupon Guin said: "You will see that his eyes are peculiar; they are rounder than most horses' eyes, which makes them look peculiar, but *they are sound as dollars.*" Guin was asked if he would warrant the soundness of the animal. He responded: "Yes, I guarantee him sound in every respect." It was subsequently discovered that the horse was, and had been for some time prior to the sale, moon-eyed—an eye disease which it seems "comes and goes," as expressed by the witnesses; that is, there would be times when the disease would appear more serious than others. From this affliction the horse became entirely blind, and the plaintiff instituted this action to recover damages for breach of the warranty. The cause was tried by the court without a jury, judgment was rendered in defendant's favor, and plaintiff has appealed to this court.

We do not think this judgment should be permitted to stand. According to the evidence contained in this record,—undisputed,—plaintiff was greatly wronged, and it would outrage every sense of justice to turn him away with his damages unrequited.

Guin owned a diseased horse, and which he knew was moon-eyed, so called. When he sought to sell to plaintiff the eyes were at their best, though even then something appeared to be the matter with them. The apparent defect was talked of, but Guin assured the plaintiff that the eyes of the horse were all right, "were

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sound as dollars," and then and there agreed to and did warrant the horse sound in this and every particular. Plaintiff relied on Guin's warranty and paid all, if not more than, the horse's value, even if he had been free from blemish. Guin's undertaking was an express warranty that the horse's eyes were sound. They were not sound at the time, and, hence, there was a breach of the contract. The facts, so amply sustained by the evidence, call for a judgment in plaintiff's favor.

The trial court seems to have adopted the theory that, as the plaintiff examined the animal before the purchase and saw an apparent defect in its eyes, he could not recover on the admitted warranty. The general rule, doubtless, is that a general warranty of soundness does not cover patent defects, nor defects known to the buyer. It is, however, a matter of contract; and, as in construing all agreements, so with this undertaking the object is to discover the real *intention* of the parties. If one sell to another a horse with three legs, one or both ears missing, or the like, then the general warranty of soundness will not be understood as covering such manifest defects. It will not be supposed in such cases that the parties so contemplated. Yet the rule is equally well settled that the vendor *may* in express terms warrant against an obvious defect. If the undertaking is clear and unequivocal we know of no rule of law that will permit the warrantor to escape the obligation of his contract. Benjamin on Sales, sec. 616; 2 Schouler's Personal Property, sec. 341; 1 Parsons on Contracts, 576, and notes; *Branson v. Turner*, 77 Mo. 493; *Thompson v. Botts*, 8 Mo. 710; *Brown v. Weldon*, 27 Mo. App. 251; *Pinney v. Andrews*, 41 Vt. 641; *House v. Fort*, 4 Black. 294; *Watson v. Roode*, 46 N. W. Rep. 491.

The case at bar is quite similar to *Branson v. Turner*, *supra*, where the ox sold had a sore neck

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visible to the eye and known at the time of the purchase. The vendor, however, assured the vendee that "that don't hurt him; it is most well," etc.; held a specific warranty, and the defendant bound. So in *Thompson v. Botts*, where the negro slave had an apparent enlargement of the neck. A like resemblance is found, too, in the well-considered case of *Pinney v. Andrews*, above cited, where the sheep sold had at the time of sale and warranty sore feet, and the vendor assured the vendee that it was not foot-rot—that they were sound. The defendant was held on his warranty even though the imperfect condition of the sheep was visible, and was seen by the vendee at the time.

The case here is even stronger for the plaintiff than any of the above. It is an instance of more than an ordinary general warranty of soundness. Though the horse's eyes were apparently defective the vendor Guin expressly and in terms warranted them to be sound; that they were only a "little peculiar, rounder than ordinarily," etc., but that they were not diseased.

On the facts disclosed in this record plaintiff was entitled to recover. The judgment was clearly for the wrong party, and will be reversed and the cause remanded. All concur.

L. P. CRIGLER, Appellant, v. THE STANDARD FIRE INSURANCE COMPANY, Respondent. 49 11 / 82 519

Kansas City Court of Appeals, April 4, 1892.

1. **Insurance:** KEEPING BOOKS IN SAFE: WAIVER. An insurance policy required the insured to keep his invoices and inventories and books in an iron safe, or some secure place not exposed to a fire that would destroy the buildings where the business was carried on. At the time of making the application the insurer's solicitor was informed the insured had no iron safe. *Held*, the issuance of the policy with such information did not constitute a waiver of the alternative of keeping the books in a secure place, and a failure to so keep them would defeat a recovery.

2. ———: BEST EVIDENCE: CONDITION PRECEDENT. Where an insurance policy requires the insured to keep books showing a complete record of the business with invoices and inventories, such books and papers are the best evidence of the amount of the loss, and their production is a condition precedent to a recovery. (*Spratt v. Ins. Co.*, 13 S. W. Rep. 792, *distinguished.*)

3. **Insurance**: PRINTED SLIP: PART OF POLICY. A stipulation printed on a slip which is attached to a policy at the time of delivery will be taken as embraced in and constituting a part of the policy.

Appeal from the Audrain Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED.

W. W. Fry, for appellant.

(1) The provision, requiring plaintiff to keep a set of books in an iron safe, may be waived by the company. *Bernard v. Ins. Co.*, 38 Mo. App. 113; *Stavinow v. Ins. Co.*, 43 Mo. App. 517; *Ins. Co. v. Stone*, 42 Mo. App. 383. (2) Defendant's agents had knowledge, that plaintiff had no iron safe. *Thomas v. Ins. Co.*, 20 Mo. App. 150; *Roberts v. Ins. Co.*, 26 Mo. App. 92; *Parks v. Ins. Co.*, 26 Mo. App. 511; *Travis v. Ins. Co.*, 32 Mo. App. 198; *Russell v. Ins. Co.*, 55 Mo. 585. *Spratt v. Ins. Co.*, 13 S. W. Rep. (Ark.) 799, is decisive of our case. Such knowledge, even though the fact is required by the terms of the policy to be noted on its face, is a waiver of such requirement. *Combs v. Ins. Co.*, 43 Mo. 151; *Franklin v. Ins. Co.*, 42 Mo. 459; *Russell v. Ins. Co.*, 55 Mo. 594; *Breckinridge v. Ins. Co.*, 87 Mo. 62; *Ins. Co. v. Downs*, 13 S. W. Rep. (Ky.) 882. (3) The application filled out by defendant's agents was but a proposal, and was received by defendant with knowledge of the fact that plaintiff had no iron safe, and that the property was incumbered, and with this knowledge the policy was issued, and then the contract was complete. *Ins. Co. v. Stone*, 42 Mo. App. 386. (4) "A paper containing particular statements relating to the subject-matter of insurance

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attached to the policy at the time it is executed is no part of the policy." May on Insurance [2 Ed.] sec. 158; *Bize v. Fletcher*, Doug. 13; *Baker v. Ins. Co.*, 25 Conn. 51; *Ins. Co. v. Morris*, 84 Ga. 759; 11 S. E. Rep. 895; *Spratt v. Ins. Co.*, 13 S. W. Rep. 799.

Hugh C. Ward and *James G. Trimble*, for respondent.

(1) To entitle the plaintiff to recover on a contract containing conditions precedent, he must allege and prove performance of all conditions precedent, or facts that excuse performance. R. S. 1889, sec. 2079; Whittlesey's Missouri Practice, p. 147; *Bayse v. Ambrose*, 32 Mo. 484; *Ins. Co. v. Wilkinson*, 13 S. W. Rep. 1103. (2) The "iron safe clause" was a part of the policy of insurance. May on Ins. [2 Ed.] sec. 158; *Landman v. Ins. Co.*, 19 Ins. Law Jour. 572. (3) There was no waiver by respondent of the "iron safe clause."

SMITH, P. J.—The plaintiff sued the defendant on a policy of fire insurance, which, amongst others, contained a clause providing that "the assured under this policy hereby covenants and agrees to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory *securely locked in a fire-proof safe at night, and at all times when the store, mentioned in the within policy, is not actually opened for business, or in some secure place not exposed to a fire which would destroy the house where said business is carried on;* and in case of loss the assured agrees and covenants to produce such books and inventory, and, in event of failure to produce the same, this policy shall be null and void, and no suit or action at law shall be maintained thereon for any such loss."

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The answer, as a defense, pleaded non-performance of the conditions of this clause by the plaintiff. The replication pleaded a waiver by defendant of the performance. The evidence adduced at the trial showed that when defendant's agent took plaintiff's application he was informed that plaintiff had no iron safe. The trial court instructed the jury that, upon the pleadings and evidence, the plaintiff was not entitled to recover for that portion of his insurance which was upon the stock of merchandise. The plaintiff appeals.

It is to be observed that by the clause of the policy in question the plaintiff not only agreed to keep a set of commercial books with the last inventory of his business, but to keep such books and inventory securely locked in a fireproof safe at night, and at all times that the store was not actually open for business, or in *some secure place not exposed to the fire that would destroy the house in which the plaintiff carried on his business.* The plaintiff bound himself to keep his books and inventory in the one place or the other. He could exercise his option as to that. While he was not required to do both, he was required to do one or the other accordingly as he should elect. There could be no compliance with this fundamental condition of the policy without this unless there was a waiver by the defendant.

The plaintiff contends that as he informed the defendant's agent at the time he made his application that he had no iron safe, that, when the defendant subsequently issued the policy with this knowledge, it thereby waived the performance of the conditions imposed upon plaintiff by the "iron safe clause." Now if it be conceded that the defendant knew when it issued the policy that the plaintiff did not have an iron safe, and that this knowledge was a waiver of the term of

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the clause requiring the keeping of the plaintiff's books and inventory in an iron safe, still the other requirement of the clause to keep his books and inventory "in some place not exposed to the fire that would destroy the house where said business is carried on," which was not embraced in the waiver, would remain unperformed. There is not the slightest pretext that this requirement was performed, nor that performance was excused by defendant. Indeed, this stands practically admitted by both the pleadings and the evidence. It was the duty of the plaintiff to comply with this agreement in the policy. This the contract required as a condition, upon the performance of which, his right of recovery depended. May on Insurance, sec. 156; *Ins. Co. v. Wilkerson*, 13 S. W. Rep. 1103.

The plaintiff testified that his ledger and a book which showed the amount of goods sold, and to whom, were not destroyed by the fire; that he never left them in the store at night. But that his other books, invoices and last inventory were burned in the fire. He further testified that he kept a set of single-entry books, which, with the exception mentioned, had been left in the store and were burned. If the plaintiff had taken the same precaution with respect to his other books as he did as to his day book and ledger, he would not be in default as he is. The condition of the policy was no doubt inserted therein for the purpose of enabling the insurer in case of loss to ascertain with some certainty the amount thereof, and to protect itself against fraud and imposition. When there is no inventory, invoice and books of account kept and preserved, is not the insurer at the mercy of the insured? The defendant sought to protect itself by the reasonable provisions of this clause. How could a court or jury determine whether the plaintiff had observed that part of his covenant to keep a set of books showing a complete record

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of his business including purchases and sales both for cash and credit, together with his last inventory without the production of them? These would afford the best evidence of the amount of the loss, and, as the store was burned in the night time when not open for business, the defendant had, under the policy, the right to the production of the same for the purpose of ascertaining the extent of plaintiff's loss, unless this right was in some way waived, which we do not think to be the fact. This was a condition precedent to the plaintiff's right of recovery.

The case of *Spratt v. Ins. Co.*, 13 S. W. Rep. 799, much relied upon by plaintiff, is not in point in this case. The policy there had a clause similar to that here. When the solicitor was preparing the application the applicant told him that he had no safe, and would keep the books in his dwelling which was a part of the building insured. The answer of the applicant showed that the books would be kept in a designated place. This was discoverable upon the application, and was known to the solicitor. It was held that the company thus advised of the purpose of the assured, without objection to it, issued the policy, and thereby acquiesced in the purpose expressed. The case, if an authority at all, is more favorable to the defendant than the plaintiff for the reason that the application of plaintiff is silent as to where his books would be kept. The "iron safe clause" of the policy was, as near as we can understand it, printed on a slip which was attached to and made part of the policy. It was so attached when received by plaintiff. It is objected by plaintiff that on this account the clause is no part of the policy. The rule is that stipulations such as the one here will be taken as embraced in and constituting part of the policy, if they appear anywhere upon its face though not written in the body.

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May on Insurance, sec. 158; *Landman v. Ins. Co.*, 19 Ins. Law Jour. 572. According to this rule the clause was properly regarded as part of the policy.

As it was in effect admitted that the plaintiff had not complied with that part of the iron-safe clause to which we have referred, and as there has been no waiver thereof by defendant, we think there is no error in the action of the trial court, and we will affirm the judgment. All concur.

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HIRAM HUNTER, Respondent, v. THE CITY OF MEXICO, Appellant.

Kansas City Court of Appeals, April 4, 1892.

1. **Evidence:** ORDINANCE: INJURY ON SIDEWALK. In an action against a city for an injury on its sidewalk, it is error to admit in testimony an ordinance manifestly referring to holes, etc., on private property.

2. **Damages:** INSTRUCTION: PLEADING: EVIDENCE: REMITTITUR. The petition in an action for personal injury alleged that plaintiff had been compelled to spend $100 in endeavoring to be cured; there was no evidence of what he had paid his physicians, the instructions told the jury to allow plaintiff all the expenses incurred, whether yet paid or not, in and about the treatment of his case. *Held*, reversible error and the appellate court cannot cure it by *remittitur*.

Appeal from the Audrain Circuit Court.—HON. E. M. HUGHES, Judge.

REVERSED AND REMANDED.

Geo. Robertson, for appellant.

(1) Permitting section 42, chapter 11, of the city ordinances to be read to the jury was error, because read with the next section 43, and showed conclusively

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that it has no sort of application to holes in the sidewalks. And no ordinances were pleaded even in substance. *City of Kansas v. Johnson*, 78 Mo. 661. (2) Instruction, numbered 7, which told the jury in estimating the damages to take into consideration "the loss of time occasioned," and "all expenses incurred (whether yet paid or not) in and about the treatment of his case," is erroneous. *Duke v. Railroad*, 99 Mo. 347; *Murray v. Railroad*, 101 Mo. 236.

Nat C. Dryden, *Hiram Moore* and *T. J. Rowe*, for respondent.

(1) The verdict is for the right party. (2) The case was fully and fairly presented to the jury upon the evidence admitted and the instructions given. (3) The matters of which defendant complains are not such, even if erroneous, as would materially affect the merits.

ELLISON, J.—Plaintiff received serious personal injury on one of defendant's sidewalks on account of defects therein. He obtained judgment below, which we are asked to reverse on account of errors at the trial.

I. A great many objections to testimony were made by defendant which were overruled. It will not be necessary to notice all of these. Sections 42 and 43 of the city ordinances were improperly admitted. They manifestly refer to holes or other dangerous places on private property. They have no reference to the sidewalks or streets of the city.

II. The petition charged that plaintiff was "compelled to spend the sum of $100 in endeavoring to be cured of his said injuries." The testimony disclosed that he was attended by several physicians and surgeons, but there was no evidence of what he paid them, or was to pay them, or as to what their services were

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worth. In this condition of the case the court instructed the jury to allow plaintiff "all expenses incurred whether yet paid or not, in and about the treatment of his case." This was error. We decided this precise question in *Rhodes v. Nevada*, 47 Mo. App. 499. Our attention is now called to the case of *Smith v. Railroad*, lately decided by the supreme court in which the same view is taken. The suggestion may occur that we could order a *remittitur* for the medical attention, but it will be noticed that, while the petition claims $100, the instruction places no limit on the amount which the jury might allow for such service.

The judgment must, therefore, be reversed and the cause remanded. All concur.

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R. D. LONG, Appellant, v. ISSACHAR NOE, Respondent.

Kansas City Court of Appeals, April 4, 1892.

Unlawful Detainer: LESSEE V. LESSOR: STATUTE. A lessee never in possession, and to whom lessor refuses possession, could not, at common law, maintain unlawful detainer against the lessor, nor can he, under sections 5120 and 5121, Revised Statutes, 1889. (*Sexton v. Hull*, 45 Mo. App. 339, *distinguished.*)

Appeal from the Boone Circuit Court.—HON. JOHN A. HOCKADAY, Judge.

AFFIRMED.

Thomas S. Carter and *Sam C. Major*, for appellant.

The court committed manifest error in refusing instruction, numbered 3. It enunciated a proposition of law which, if correct, was decisive of this case, and entitled plaintiff to a judgment. It asked the court to declare the law to be, "That a lessee, who had not been

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in possession under his lease, is, within the meaning of the statutes, an assign of the owner and lessor, and may maintain the action of unlawful detainer." That such is the law I refer to the case of *Kelly v. Clancy*, 15 Mo. App. 519. Judge THOMPSON, in delivering the opinion of the court, pages 524 and 525, makes a thorough review of the statute upon this subject, and declares the law as in this instruction asked. The real owner of the property may be guilty of unlawful detainer. *Gooch v. Holland*, 30 Mo. App. 450.

A. W. Turner, for respondent.

The vital force of the appellant's contention culminates in instruction, numbered 3. That instruction asserts as a legal proposition, that the appellant can maintain this action against his lessor (respondent), because he is the "assign" of respondent, although he (appellant) had never been seized, and, consequently, had never been disseized of the possession of the premises. Now, appellant cannot avail himself of this instruction, because, *first*, it directly controverts the averment of his complaint, "that he was in the possession of the premises, and that respondent afterwards, without force, by disseizin, obtained such possession; and, *second*, because the word "assign," employed by the statute on which the instruction is bottomed, gives to the appellant a right to maintain this action against third persons only, persons other than the assignor or lessor, and gives him no right of action against respondent as the "assign" of the latter. The only instance in which he could maintain an action of unlawful detainer against respondent would be in a case in which appellant showed himself, *first*, to have been in possession; *second*, that respondent had, without force, by "disseizin," deprived him of that possession. The case

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of *Kelly v. Clancy*, 15 Mo. App. 519, which is cited by the counsel for appellant, is decisive of this point, and is eminently pertinent. See, also, in this connection *Ford v. Fellows*, 34 Mo. App. 630, and case therein cited.

Ellison, J.—This action is unlawful detainer, presenting a single question for our decision. There were two points made against the judgment, but as one of them embraced a question of fact decided adversely to plaintiff in the trial court, he has withdrawn it from our consideration. The remaining question is this: Can a lessee, never in possession, and to whom the lessor refuses possession, maintain unlawful detainer against the lessor? The trial court thought not, and this being also our opinion we will affirm the judgment. Prior to the statute of 1855, an action of forcible entry and detainer, or unlawful detainer, could not be maintained by one who had never been in possession. He was driven to an action of ejectment. *Sexton v. Hull*, 45 Mo. App. 339. That statute which is yet in force, being found in the revision of 1889 as sections 5120 and 5121, relieved this inconvenience; but, we think, not to the extent claimed by plaintiff. Section 5120 reads as follows: "Heirs, devisees, grantees and assigns of any lands * * * shall be entitled to the same remedies against persons guilty of forcible entry and detainer, or unlawful detainer * * * before the descent, devise, grant or assignment, as the ancestor, devisor, grantor, assignor or intestate was entitled to by virtue of this chapter." This section simply provides that when there has been a forcible entry and detainer, or unlawful detainer, before the death of the owner, or before the grant or assignment of such owner, that, in such case, the heir, or the grantee, or assignee, could invoke the same remedy which the ancestor, or grantor, or assignor,

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could have asserted. *Kelly v. Clancy*, 15 Mo. App. 519.

Section 5121 reads that, "If any lessor of any lands * * * shall die, or shall grant or assign such lands * * * before the expiration of the term for which they were demised or let, his heirs, devisees, grantees, assigns and * * * shall have the same remedies against anyone guilty of an unlawful detainer, by holding over, * * * as such lessor would have if he had not died, or had not granted or assigned such lands." * * *

This section simply enacts that when lands are rented or leased, and, after renting or leasing, the lessor dies, or sells, or assigns, his heirs, grantees or assignees shall have the same remedies against the tenant or lessee that he, the lessor, would have been entitled to had he not died, sold or assigned. These sections continue a remedy to the heirs, devisees, grantees, assignees or lessees which existed in the ancestor, grantor, assignor or lessor. The sections necessarily contemplate third parties as being guilty of the forcible entry, or unlawful detention. In the case at bar, the lessor himself is the party guilty of the unlawful detainer. The statute, therefore, is not applicable. It does not cover such a case. By the assignment or grant, the assignor or grantor transfers his remedy—not against himself, for that would be a strange thing—but against third persons.

There is nothing in the case of *Sexton v. Hull*, 45 Mo. App. 339, which in the least conflicts with what we decide in this case. It is true that in that case we sustain unlawful detainer brought by a grantee, who had never been in possession, against the prior owner, the grantor in a deed of trust. But in that case the grantor in the deed of trust, by the provisions of the deed, made himself the *tenant* of the trustee. His possession was

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the trustee's possession as his landlord (*Kaulleen v. Tillman*, 69 Mo. 510), and the trustee could, of course, assert the remedy of unlawful detainer. When, therefore, the trustee sold the land, the purchaser at such sale became a grantee, and thus entitled, under the terms of the foregoing statute, to the remedy of unlawful detainer against the grantor in the deed of trust. The judgment is affirmed. All concur.

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JOSEPH A. MARTIN, Appellant, v. THE ASHLAND MILL COMPANY, Respondent.

Kansas City Court of Appeals, April 4, 1892.

1. **Bailment:** SALES: EXCHANGE. Plaintiff deposited with the defendant mill company wheat with the understanding that on demand he should be entitled to so many pounds of flour per bushel. *Held,* not a bailment nor a sale, but an exchange.

2. **Sales:** ELEMENTS OF. The elements of a sale are, parties competent to contract, mutual consent, absolute property in the thing transferred and a price in money.

3. **Exchange:** SALE: RULES. An exchange is a reciprocal contract for the interchange of property, each party being a vendor and a vendee as in sales; the title is absolutely transferred, and the same rules are applicable as in sales.

4. **Customs:** CONSTRUCTION OF. Customs and usages must be construed strictly, even more so than any act of parliament that alters the common law.

5. ———: VARYING RULE OF LAW: UNREASONABLE. A custom cannot be permitted to vary a general and well-settled rule of law; nor will parties be held to enter into contract with reference to an unreasonable custom that leads to absurd consequences, especially when unknown.

6. ———: PARTICULAR BUSINESS: KNOWLEDGE. A person entering into a contract is not bound by the usage of a particular business, unless it be so general as to furnish a presumption of knowledge, or it is proved he was acquainted with it.

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Appeal from the Boone Circuit Court.—HON. JOHN A. HOCKADAY, Judge.

AFFIRMED.

Eli Penter and *C. B. Sebastian*, for appellant.

(1) The transaction constituted a sale, and was not a bailment. *Coleman v. Lipscomb*, 18 Mo. App. 443, and authorities there cited; 2 Parsons on Contracts [7 Ed.] p. 133, note 5. (2) In order to do away with the well-established rule, which makes this transaction a sale and renders the defendant liable, the trial court holds that the defendant must show two things: *First*. That at the time of the delivery of the wheat there was a general and uniform custom that wheat so delivered as aforesaid, and under like agreements, was received by the miller, and the flour to be returned therefor, pursuant to said agreement, was held by him subject to the risk of the party entitled thereto of being destroyed by fire. *Second*. That the plaintiff and defendant, knowing of the custom at the time, contracted in the agreement first aforesaid with reference to it. I am aware that this court has a well-established rule that it will not reverse the judgment of the trial court where there is any evidence to sustain it. In this case we ask a review of the judgment, because there was no evidence to sustain it. (3) Admitting that there is some evidence of an established general and uniform custom, which we do not admit, plaintiff would not be bound by it, unless he had knowledge of it at the time he delivered the wheat and contracted with reference to it. *Hyde v. Book & News Co.*, 32 Mo. App. 298. There was no evidence that the plaintiff ever heard of such a custom until after the mill burned, and this court will not permit a judgment to stand where there is no evidence to sustain it. *Krider v. Milner*, 99 Mo. 145;

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Bruen v. Fair Ass'n, 40 Mo. App. 425; *Avery v. Fitzgerald*, 94 Mo. 207.

Wellington Gordon and *E. M. Bass*, for respondent.

(1) In the case of *Inglebright v. Hammond*, 19 Ohio, 337, the court in this case also held that, "Where a person taking his wheat to a mill to be ground, by the assent of the miller, mingles it with the wheat of the miller, he does not thereby lose his property in the wheat, but retains a property in so many bushels of the common stock as he has put in; although, by a contract between the parties, the person delivering it is to receive a certain quantity of flour for a certain number of bushels of wheat." *Gregory v. Stryker*, 2 Denio (N. Y.) 628, and authorities there cited; *Seymour v. Brown*, 19 John. 44; *Downer v. Rowell*, 22 Vt. 347; *Arthur v. Railroad*, 61 Iowa, 648; *Lyon v. Lemon*, 106 Ind. 567; *Dole v. Olmstead*, 36 Ill. 150; 41 Ill. 344; *Broadwell v. Howard*, 77 Ill. 305; *Young v. Miles*, 20 Wis. 615; 14 Allen, 376; 99 Ind. 395; 18 N. Y. 363; 4 N. Y. 76; 7 N. Y. 433. (2) Aside from the foregoing, we hold the judgment of the trial court should not be disturbed in any aspect of this transaction, be it a sale, ordinary bailment, or a tenancy in common, as we conceive it to be the well-established law in all such transactions, where there is a special agreement between the parties, that the wheat was to remain at the owner's risk; this would prevent the title from passing when deposited, and the transaction would be rather a tenancy in common, or a conditional bailment and not a sale, and certainly a party can lessen his liability by contract. 56 Me. 121; *Nelson v. Brown*, 44 Iowa, 455; 53 Iowa, 554; *Sexton v. Graham*, 53 Iowa, 183; *Ledyard v. Hibbard*, 48 Misc. 421; *Arthur v. Railroad*, 61 Iowa, 648. "*Q*. When did that conversation take place? *A*. That was just a short time after the fire. It was

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when the thing was red hot, and everybody was talking about it." We think this evidence fully and amply supports the verdict and judgment of the trial judge. Our supreme court has repeatedly held that, where there is any evidence to support the verdict, or where the evidence is conflicting, this court will not disturb the finding of the trial court. *Pierce v. Chamberlain*, 82 Mo. 622; *Meyer v. McCabe*, 73 Mo. 240. (3) "Evidence of custom may properly be given to explain and give the proper effect to the contracts and acts of parties." *Inglebright v. Hammond*, 19 Ohio, 337; *Soutier v. Kellerman*, 18 Mo. 509.

Smith, P. J.—This was an action commenced before a justice of the peace. The cause of action set forth in the first count of the plaintiff's statement is, that he sold and delivered to defendant corporation, a milling company, thirty-eight bushels of wheat for which defendant agreed to pay plaintiff in flour at the rate of twenty-nine pounds per bushel, on demand, and which defendant had refused to pay and deliver although often requested to do so. There was a second count in a similar cause of action, which was alleged to have been assigned to plaintiff.

It appears from the evidence that the defendant was engaged in the operation of a flouring mill in the village of Ashland in Boone county, and that it was, and had been for many years, its custom to receive wheat from the neighboring producers, and allow them, according to quality, so many pounds of flour per bushel, to be subsequently delivered on demand, or to pay them at their option the value of the wheat in money. It further appears that the wheat was delivered between the tenth and fifteenth of July, and a part on the first day of August, 1890, and the quantity of flour per bushel to be given in exchange therefor was

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agreed upon. The wheat was deposited in what is termed the "sink," and from whence it was elevated to be ground into flour. It was mixed with other wheat placed in the "sink." The wheat was entered on the mill books to be paid for in flour.

Dr. Martin, who was president of the defendant mill company, testified that it was the custom of the mill company to have the wheat deposited with it at the loss of the party putting it there. His testimony was corroborated by a number of the customers of the mill. There was also a number of them who testified they had never heard of such custom. The plaintiff testified that he never heard of it before the transaction which gave rise to this suit. There is no pretense that there was any special agreement entered into that, if the wheat received of plaintiff should "be burned up," the defendant should be relieved of the payment therefor. The mill was burned on the fifteenth day of August following the delivery of the wheat in question. After the destruction of the mill the plaintiff demanded the quantity of the flour which the mill had agreed to deliver him for his wheat. A compliance with which was declined by defendant. There was no evidence offered tending to show that the wheat which plaintiff had placed in the sink, or that any other wheat, was there at the time of the destruction of the mill. There was some evidence tending to prove that there was at all times sufficient wheat in the mill to pay for all the flour it owed.

The court sitting as a jury declared the law to be that if the plaintiff delivered the defendant the wheat under an agreement that he should receive therefor upon demand a specific amount of flour made from wheat taken at random from wheat in the defendant's mill collected from other sources, and that plaintiff thereafter demanded the delivery of the flour, and the

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defendant refused to either deliver the same or to pay the value thereof in money, then plaintiff was entitled to recover the value of the flour at the time of the demand, unless defendant had proven that there was an established, general and uniform custom that wheat so delivered and under like agreements was received by the miller, and the flour to be returned therefor pursuant to said agreement was held by him, subject to the risk of the party entitled thereto of being destroyed by fire; that the plaintiff and defendant, knowing of the custom at the time, contracted in this agreement with reference to said custom, and that the flour to which plaintiff was entitled was destroyed by fire without the fault of defendant.

The judgment was for defendant, and from which plaintiff has appealed.

The case was submitted to the court without the intervention of a jury. It becomes, therefore, important to examine the instruction of the court with the view of determining the correctness of the theory of law which it adopted in deciding the case. Was the transaction between plaintiff and defendant a bailment, sale or exchange?

If a bailment, the title to the wheat did not pass to the defendant because a contract of bailment contemplates the return of the goods bailed or growing out of the necessities of commerce, as, where grain is delivered in store, other grain of like quality and grade may be returned in its stead. Nor does the mere fact that it was mixed with a mass of like quality with the knowledge of the bailor convert that into a sale which was originally a bailment. *Lynn v. Lemon*, 106 Ind. 567; *Nelson v. Brown*, 44 Iowa, 455; *Sexton v. Abbott*, 53 Wis. 106. The agreement proved in this case shows that the defendant was subsequently, on demand, to deliver the plaintiff a certain quantity of flour for the

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wheat received. So the contract proved was not that of bailment.

Whether the transaction was a sale or not depends upon whether it contained these elements: *First*, parties competent to contract; *second*, mutual consent; *third*, absolute property in the thing which was the subject of the transfer; *fourth, a price in money*. Tiedeman on Sales, sec. 1. The consideration agreed upon for the delivery of the wheat was a specific quantity of flour, and *not a price in money*. And, therefore, the transaction was not a sale within the meaning of the rule just stated. If the contract had, as it did not, fixed the price of the wheat delivered and called for, and its payment in flour, then the transfer of the wheat would have been a sale. There being no price in money agreed upon for the wheat delivered, there was no sale.

The transaction between these parties was, properly speaking, an agreement for an exchange of goods and not for a sale. It was a commutation of goods for goods, and, therefore, an exchange and not a sale. Tiedeman on Sales, secs. 12, 150; Benjamin on Sales, 7; 1 Parsons on Contracts, 436; 2 Blackstone, 446; Chitty on Contracts [Ed. 1851] 332; *Mitchell v. Giles*, 12 Vt. 390; *Slayton v. McDonald*, 73 Me. 50; *Gunter v. Lecky*, 30 Ala. 596; *Williams v. Berry*, 8 How. (U. S.) 544. An exchange has been defined to be a reciprocal contract for the interchange of property, each party being a vendor and a vendee. Anderson 's Dictionary of Law, 427; *Bixby v. Burt*, 59 Cal. 528. The distinction, however, between a sale and an exchange is rather one of shadow than of substance, for in both cases the title *is absolutely transferred*, and the same rules of law are applicable. *Commonwealth v. Clark*, 14 Gray, 372; Benjamin on Sales, 7; Tiedeman on Sales, secs. 1, 12;

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Dowling v. McKenney, 124 Mass. 480; *Bedford v. Pegg*, 38 N. Y. 212.

The case of *Inglebright v. Hammond*, 19 Ohio, 337, cited by the defendant, is not applicable to the present case. There the miller agreed out of every four and one-half bushels of wheat furnished by Hammond to manufacture for him one barrel of flour, for which he was to charge thirty-three and one-third cents. The wheat was furnished to the miller under the agreement without objection by Hammond, mingled in the vat with his own; while the wheat was thus mingled, the miller absconded. Hammond caused an employe of the miller's to manufacture fifty barrels of flour out of the mass of wheat in the mill with which his was mingled, and this flour was seized under execution by the miller's creditors. It was held that the mingling of the wheat by consent of the owners did not have the effect to divest them of the title to their proportionate part of the mass, or, in other words, that each party retained the property in quantity equal to what he put into the common stock. The contract was neither that of sale, barter or exchange, and, hence, is distinguishable from the case at bar. It is quite true that, after the grain got mingled with that of the miller, the court, to uphold and protect the rights of Hammond, applied the principle of the elevator and warehouse cases. *Dole v. Olmstead*, 36 Ill. 150, and other cases cited in note 4 to section 7 in Tiedeman on Sales.

Turning to the instruction in this case, and it will be observed that so much of it as declares the transaction between plaintiff and defendant had the effect to transfer the title of the wheat to the defendant was perhaps well enough; but not so, that part of it which declared that if there was "*an established, general and uniform custom that wheat so delivered as aforesaid and under like agreements was received by the miller, and the*

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flour to be returned therefor pursuant to said agreement was held by him subject to the risk of the party entitled thereto of being destroyed by fire, and that plaintiff and defendant knew the custom and contracted with reference to it," etc. This part of the instruction is obnoxious to the objection that there is not the semblance of evidence of any custom among millers generally, or of the defendant's mill, that the *flour* which the miller was to give in exchange for the wheat received was subject to the risk of the person entitled thereto. The flour due the depositor of the wheat was not within the custom proved. "Customs and usages must be construed strictly—nay, very strictly—even stricter than any act of parliament that alters the common law." Lawson on Usages & Customs, 108.

But there is another objection to this part of the instruction just quoted, which is that if the transaction between the plaintiff and defendant was an exchange or transmutation of commodities, then as we have seen the title to the wheat passed to the defendant, and no custom could have the effect of so qualifying or limiting the defendant's ownership of it that the title would not be in him if destroyed by fire; but if not it would be. This would vary the general and well-settled rule of law, which custom cannot accomplish. *Ober v. Carson*, 62 Mo. 209; 19 Ohio, 337, *supra*.

And, besides this, it is apparent that such a custom would be unreasonable, and would lead to the most absurd consequences, and for that reason it cannot be enforced in a court of justice even if proved. Parties cannot be held to have entered into a contract with reference to it, and, especially so, when unknown to the party seeking to avoid it. Lawson on Customs, secs. 35, 36, 37.

It is a further rule that a person entering into a contract is not bound by the usage of a particular business,

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unless it is so general as to furnish a presumption of knowledge, or it is proved that he was acquainted with it. *Stevens v. Reeves*, 9 Pick. 198; *Hyde v. Book & News Co.*, 32 Mo. App. 298; *Brown v. Strimple*, 21 Mo. App. 238; *Walsh v. Trans. Co.*, 52 Mo. 434. The proof does not bring this case within that rule.

The evidence does not show that the wheat which defendant received of the plaintiff was in the mill at the time of its destruction. The plaintiff had neither wheat nor flour in the mill at that time. He was entitled by the terms of the exchange to so many pounds of flour when demanded. The flour had not been demanded, weighed out, and set aside for the plaintiff. The defendant was only bound by its contract to deliver so much flour on demand. If it refused, it was liable in damages for the value of the flour at the time of demand. The latter part of the instruction was improper, and, hence, the theory of law upon which the court proceeded was erroneous.

The judgment of the circuit court will be reversed, and cause remanded with directions to enter judgment for the plaintiff for the sum of $29.37 with six per cent. thereon from the date of the commencement of the suit. All concur.

DAVID L. BARTLETT, Appellant, v. EUGENIA S. EDDY *et al.*, Respondents.

49 32
50 364 Kansas City Court of Appeals, March 7, and April 4, 1892.

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1. **Assignments**: CHOSES IN ACTION: DELIVERY: NOTICE: COMMON LAW: STATUTE. At common law the assignment of choses in action was not recognized, and was only vitalized by equity and through the use of the assignor's name, and the title thereto was not perfected as against the debtor till notice of the assignment to him, but, under the

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statute, the assignment and delivery of bonds and notes immediately vests the legal title in the assignee without notice, and he may sue in his own name, while in the case of such choses in action as are not capable of manual delivery notice seems necessary to complete the title. (Missouri statutes and cases reviewed.)

2. ———: DISCHARGE BY ASSIGNOR: DEFENSE. The present statute puts it out of the power of the assignor to release a note after he has assigned it, but reserves to the payor (and to him alone) the defense which accrued to him before notice of the assignment. GILL, J., *dissenting, holds* that in this case, though there was an assignment as between the assignor and assignee, yet it was not effective as against the debtor without notice.

3. ———: PAYMENT BY MAKER: MORTGAGE. If the payor, without notice of the assignments, pays the sum due on the note to the assignor, such payment, while it is not properly speaking a payment of the note, will operate as a discharge of, or a defense for, the payor; but will not discharge the lien of a mortgage on lands in the hands of a third party who is not connected with the mortgage. [GILL, J., *dissenting.*]

4. ———: ———: ———. Payment to an assignor after an assignment of a non-negotiable note amounts to nothing more than a defense to the payor alone, and to no one else save those who by their relation to the payor could compel him to make good their loss.

5. ———: REGISTRY STATUTE. The registry statute does not require the assignment of a note and mortgage to be recorded, nor require the assignee to notify the successive grantees of the assignor of the assignment.

6. ———: CONVEYANCE OF MORTGAGE TO MORTGAGOR NO MERGER. Where a mortgagee after the assignment of the note to a third party takes a conveyance of the mortgaged premises to himself, equity will not permit such conveyance to operate as a merger of the two estates in him.

7. **Mortgages:** RELEASE BY MORTGAGEE. The fact that a mortgagee, after assignment of the mortgaged debt, enters a satisfaction of the mortgage on the margin of the record cannot affect the rights of his assignee, or his grantees after his subsequent acquisition of the mortgaged premises.

8. **Assignment:** CONVEYANCE TO MORTGAGEE: ESTOPPEL. SMITH, P. J., *concurring:* "Where a mortgagee, after his assignment of the note, takes a quitclaim deed to the mortgaged premises in satisfaction of the note, he is estopped as against his assignee to deny the mortgage lien on the premises, and so are his grantees. GILL, J., *dissenting, holds* that such transaction bars the foreclosure of the mortgage, the debt and the mortgage being for this purpose inseparable, and when the note is paid the mortgage expires.

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9. ———: NOTICE: PAYMENT TO ASSIGNOR: EFFECT ON MORTGAGE. GILL, J., *further dissenting:* Where the assignee of a non-negotiable note secured by a mortgage fails to give notice of the assignment to the payor, the latter is justified in regarding the assignor still the owner or the agent of the owner to receive payment; and payment to the assignor is a complete and entire satisfaction of the debt, and the mortgage security on the land is extinguished with the debt (*doubting Rice v. McFarland,* 34 Mo. App. 404); nor is this position impaired by the rule that, though an action on the debt be barred by the statute of limitations, yet a suit on mortgage may be maintained.

Appeal from the Nodaway Circuit Court.—HON. CYRUS A. ANTHONY, Judge.

AFFIRMED.

William C. Ellison, for appellant.

(1) R. S. 1889, sec. 8161; 2 Jones on Mortgages [3 Ed.] sec. 1631; vol. 1, sec. 727; 3 Randolph on Commercial Paper, sec. 1417; *Trustees v. Wheeler,* 61 N. Y. 88; *Howard v. Gresham,* 27 Ga. 347; 1 Jones on Mortgages [3 Ed.] sec. 604; *McCabe v. Farnsworth,* 27 Mich. 52; *Bank v. Bynum,* 84 N. C. 21; *Hubbard v. Turner,* 2 McLean, 519; *Jones v. Smith,* 22 Mich. 360; *Sharts v. Awalt,* 73 Ind. 304; 2 Herman on Estoppel, sec. 914; *McClurg v. Phillips,* 57 Mo. 214; *Anderson v. Baumgartner,* 27 Mo. 80; *Hughes v. McAlister,* 15 Mo. 296; *Lee v. Turner,* 89 Mo. 489; *Neuhoff v. O'Reilly,* 93 Mo. 164; *Bank v. Bank,* 71 Mo. 195; *Turner v. Hoyle,* 95 Mo. 337; *Anderson v. Bank,* 14 Iowa, 544; *Lewis v. Kirk,* 28 Kan. 497; 1 Jones on Mortgages [3 Ed.] sec. 492; 2 Pomeroy on Equity Jurisprudence, sec. 794. (2) In conclusion, I wish to refer especially to the case of *Rice v. McFarland,* 34 Mo. App. 404. While what is said in the opinion in that case does not cover all of the questions raised in this, it must be said that it is opposed to some of the propositions herein submitted. If there is a single authority in the states, going as far as that

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opinion, I have not been able to find it. Certainly none such are cited. *Edgerton v. Young*, 43 Ill. 464, is referred to, but the title relied on there to defeat the mortgage was founded on an execution sale. Moreover, the note was negotiable, and assigned by indorsement, for value, before maturity. No negligence was chargeable to the assignee for failing to give notice of the assignment. No negligence of the assignee enabled his assignor (the mortgagee) to practice deception on the mortgagor, and get the title away from him. Such, and more, are the facts in this case; and while the equities were not so persuasive in *Rice v. McFarland*, I think they were sufficient to have justified a different opinion. However that may be, the Illinois case, in so far as it bears the slightest analogy to *Rice v. McFarland*, was overruled by the same court in the case of *Ogle v. Turpin*, 102 Ill. 148.

S. R. Beach and *W. C. Frank*, for respondents.

(1) Appellant insists that Craig was, to some extent, respondents' agent, simply because he sent interest to them, to be credited upon the note. But if our agent he couldn't receive payment of our debt in land from Hall to Seals, nor in anything but money (even if he had the note in his possession, which he didn't). *Wheeler & Wilson v. Given*, 65 Mo. 89; *Smith v. Johnson*, 71 Mo. 382; *Martin v. United States*, 15 Am. Dec. 129–133; *Graham v. Savings Inst.*, 46 Mo. 186; 2 Daniels on Negotiable Instruments [2 Ed.] sec. 1245. (2) The question in the case, "Did our deed of trust merge into Craig's after-acquired title received from Hall? We say not. Equity very properly steps in to prevent a merger where the merger would operate to carry into effect a wrong and a fraud. The doctrine of set-off (R. S. 1889, sec. 8161) has no application in

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this suit. The fact that the title to the same land afterwards, and after he had assigned the note, was lodged in Craig (the former title conferred upon him by the deed of trust having been assigned to us), would not merge into his after-acquired title, nor be, in any way, affected by it. 1 Jones on Mortgages [3 Ed.] sec. 872; *Collins v. Stocking*, 98 Mo. 290; *Pratt v. Bank*, 33 Am. Dec. 201. (3) Craig, the payee of the note, assigned it to us, January 15, 1886, and attempted to release the deed of trust on the margin of the record, without knowledge or consent of, or any authority from, respondents, on July 27, 1889, which he could not do, not then being the beneficiary, negotiable or non-negotiable, and our statutes require no notice or recording of an assignment. R. S. 1889, sec. 2390; *Rice v. McFarland*, 34 Mo. App. 404; *Bank v. Grewe*, 84 Mo. 478. And the deed of trust lien is even more sacred or better guarded than the debt itself. *Lee v. Clark*, 89 Mo. 553–9; *Hagerman v. Sutton*, 91 Mo. 520; 1 Jones on Mortgages [3 Ed.] sec. 814. (4) All the antagonistic parties in this suit are estopped by the fact that they "all knew from examination of the records on July 27, 1889 (before plaintiff got any title to any of this land), 'that our deed of trust stood unsatisfied on the record,'" and the record showed when all these after loans were made, and plaintiff was bound by the records to know that Hall had deeded the land back to Craig and to ascertain whether a merger had taken place. *Hasenritter v. Kirchoffer*, 79 Mo. 242, and authorities there cited; *Taylor v. Fox*, 16 Mo. App. 527.

Ellison, J.—The defendant, Mrs. Eddy, is the *bona fide* assignee for value of a non-negotiable promissory note and deed of trust securing same. The note was given to Silas L. Craig by John Hall, and by Craig

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assigned to Mrs. Eddy. The plaintiff seeks to enjoin Mrs. Eddy from foreclosing the deed of trust. The case was tried on an agreed statement of facts. The statement is quite lengthy, but the following is believed to be a sufficient epitome to a full understanding of the case.

December 1, 1885, Craig sold to Hall the southwest quarter of the southwest quarter, and the southeast quarter of the southwest quarter, and took note and deed of trust for $700, due in two years, to secure purchase money. He recorded the deed of trust, January 13, 1886. January 15, 1886, Craig assigned in writing and delivered said note and deed of trust to Mrs. Eddy who paid value in good faith. October 15, 1887, Hall conveyed back to Craig (as he supposed but in reality to one Seals), by quitclaim deed, all the land he bought of him, for the consideration of the $700 note (theretofore assigned and delivered to Mrs. Eddy unknown to Hall), and some other land. Hall demanded his note of Craig, but was put off from time to time till May 17, 1890, when Craig gave him a receipt. Seals had no interest in any of the transactions in this case. He was merely Craig's shadow, Craig using his name instead of his own.

May 1, 1888, Craig borrowed of Gilbert and Gay $1,000, and to secure same gave (through Seals) deed of trust on the southwest quarter of the southwest quarter. On the same day he gave a second deed of trust to Bartlett Bros. for $100. Neither of these beneficiaries had actual knowledge of the note and deed of trust which had been assigned to Mrs. Eddy, but relied on Craig's assurances that the title was clear.

May 1, 1888, Seals conveyed to Craig by warranty deed the southeast quarter of the southwest quarter, and Craig on the same day conveyed same tract by warranty deed to Joseph L. Dunning, Dunning relying

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on Craig's representations that the note was paid. May 1, 1888, Dunning borrowed, through Craig, $850 of Gilbert & Gay, and to secure it gave deed of trust on the said southeast quarter of the southwest quarter, Gilbert & Gay relying on Craig's statement that the title was clear. July 27, 1889, Gilbert & Gay and Bartlett Bros. inquired of both Craig and Hall about the Hall-Craig note and deed of trust (which had been assigned to Mrs. Eddy more than three years before), and were told by them that they were paid; and Craig on that day did enter satisfaction on the record.

December 10, 1889, Seals conveyed to Craig, by warranty deed, the southwest quarter of the southwest quarter, which, as shown above, had been mortgaged to Gilbert & Gay to secure $1,000 and to Bartlett Bros. to secure $100. December 20, 1889, Craig conveyed, by warranty deed to the plaintiff, the southwest quarter of the southwest quarter, representing that the Hall-Eddy note was paid. August 15, 1890, plaintiff got notice of the assignment to Mrs. Eddy.

November—, 1890, plaintiff purchased at sale, under the Dunning deed of trust to Gilbert & Gay, the southeast quarter of the southwest quarter, and also purchased at sale under the Seals deed of trust to Bartlett Bros. the southwest quarter of the southwest quarter.

In the foregoing transactions of Craig, since his assignment to Mrs. Eddy, he was acting fraudulently and in bad faith.

The question presented by these facts is whether Mrs. Eddy, as assignee, can subject the land in plaintiff's hands to the lien of the deed of trust securing the note assigned to her. Formerly, at common law, the assignment of choses in action was not recognized. Whatever vitality it had came from equity, and the remedy of the assignee on the instrument was in equity

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(Story on Contracts, sec. 465), and through the use of the assignor's name. Under such conditions it was generally understood that the title to the chose was not perfected in the hands of the assignee as against the dector till he had given notice of the assignment to the debtor. Such is not the rule now as to a bond or note. Our statute now provides that such assignment may be made, and that the action thereon may be in the name of the assignee. The effect of this is that now the legal title is vested in the assignee immediately upon assignment without regard to notice to the debtor. As to that vast variety of choses capable of assignment, other than bonds or notes, such, for instance, as may arise from funds or annuities provided by will or deed, and which are not capable of manual delivery, it seems that notice to the trustee or debtor is necessary to complete the title. The whole object of the rule, either in law or equity, is to put it out of the power of the assignor to commit fraud, and, therefore, possession in the assignee is the requisite to the validity of the assignment. But as to those choses which have, so to speak, no individuality, and which cannot be delivered, notice to the trustee or debtor is considered a symbolical delivery. In each case fraud is prevented. If the bond or note be delivered to the assignee no one can be imposed upon as a subsequent assignee, for the assignor has not the thing to assign, nor can the debtor be defrauded (except through his own negligence) by paying to his creditor, the assignor; for he should, unless excused by statute, see that such assignor has the note. In the other instance, when possession cannot be bodily delivered, a notice to the trustee or debtor answers every purpose of protection. Leaving the assignor in possession of a bond or note is like leaving him in possession of any other chattel after sale; it gives him the appearance of ownership, and enables him to defraud those

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with whom he may afterwards deal. These views are supported by the case of *Dearle v. Hall*, 3 Russell, and *Ryall v. Rowells*, 1 Ves. Sr. 347. And considerations similar to these doubtless led Judge SCOTT to say in *Richards v. Griggs*, 16 Mo. 416: "When debts are assigned which are evidenced by bond, bill or note, the debtor is never at a loss to know to whom it shall be paid, as he is warranted in taking up the instrument in whosoever's hands it may be found. But not so with regard to those *choses*, whose existence is not witnessed by any such instrument. Anybody may obtain a copy of a judgment, or make out an account, and a debtor or trustee pays debts of this character at his peril to any other person than him who is really entitled to them." See, also, where the same matter is stated in yet stronger terms: *Gayoso Savings Inst. v. Fellows*, 6 Cald. 467; *Mutual Pro. Ins. Co. v. Hamilton*, 5 Sneed, 269.

But the statutes of Missouri, beginning at an early day, made alterations in the law as it stood before its enactment. I will notice these. In 1825 the statute was that it should not be in the power of an assignor to release a demand after he had assigned it; provided, however, that the defendant could make the same defense against the assignee that he could have made against the assignor if the note had remained in his possession when the defense accrued. The case of *Bates v. Martin*, 3 Mo. 367, arose under this statute. In that case the note was assigned and delivered, and afterwards the payor paid the sum due on the note to the assignor. The court held (construing the foregoing statute) that the defense of payment accrued while the assignee held the note; that before the payor paid the money he should have seen that the payee still retained the note, and that it was the duty of the payor to look after his note, and to know that he pays his

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money to whom it is due. To the same effect are the cases of *St. L. Perp. Ins. Co. v. Cohen*, 9 Mo. 442, and *Heath v. Powers*, 9 Mo. 774. Our statute is not now the same. It is now provided as it was formerly: "It shall not be in the power of the assignor of a demand, after assignment, to release any part of it." R. S. 1889, sec. 2390. But under the heading of "set-off" it is now provided that "in actions on assigned accounts and non-negotiable instruments, the defendant shall be allowed every just set-off or other defense which existed in his favor at the *time of his being notified* of such assignment." Sec. 8161. The present statute, then, puts it out of the power of an assignor to release the note *after* he has assigned it, but preserves to the payor (and to the payor only) the *defense* which accrued to him before notice of the assignment. The legal title to the note is in the assignee upon the assignment in writing and delivery. He is the owner, and the only one to whom it can be paid or who can discharge or release it; and so the statute enacts. By force of the same statute, however, if the payor, without notice of the assignment, pays the sum due on the note to the assignor, such payment, while it is not, properly speaking, a payment of the note, will operate as a discharge of, or *defense* for, the payor. *Rice v. McFarland*, 34 Mo. App. 404. But it will not discharge the lien of a mortgage on lands in the hands of a third party who is not connected with the mortgage. *Rice v. McFarland*, 34 Mo. App. 404. It by no means follows that in all instances of discharge of the debtor the mortgage dies. There may be a discharge of the debtor without a discharge of the debt. There are numerous instances in which the mortgage lien remains after the discharge of the mortgagor. *Hemenway v. Bassett*, 13 Gray, 378; *Baldwin v. Norton*, 2 Conn. 161.

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We may concede here that a negligent payment, as made by Hall, of the sum due to an assignor after assignment and delivery to the assignee, would be one of the "defenses" contemplated by the statute. But I am confident that an examination of this question of assignment of choses in action, from its origin down, as it is now influenced or governed by the statute, will show that a payment to an assignor, *after* assignment, of the sum due on a non-negotiable note amounts to nothing more than a defense to the payor. The importance here of this distinction is that if it be allowed to be good it defeats the plaintiff in this action. Here the payor, without notice of the assignment, paid the amount of the note to the assignor after he had assigned it to this defendant, by making a quitclaim deed to the land covered by the mortgage. This land has found its way by successive conveyances to these plaintiffs. Now, can they avail themselves of a defense which the statute only gives to the payor? I am satisfied that they cannot. The statute allows to the *payor* "every just set-off or other defense." It must be conceded that all other defenses than payment would be personal to the payor. If, in this case, the payor had not paid the sum due on the note, but had had a set-off against the assignor which he might have availed himself of if he had been sued, would it be contended that these plaintiffs could use such set-off in their behalf? There are other defenses which might be asserted by the payor, but which no one would consider available to anyone else.

There is a qualification to be made to the foregoing general statement. It is this: Those, who, by their relation to the payor could compel him to make good their loss, would be entitled to enforce for their protection the right which would exist in the payor if he were sued. It has even been held that judgment creditors

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were such parties as could be subrogated to the payor's right. 1 Hopkins, 579; 9 Cowen, 409. However this may be, I should say certainly that, wherever the effect of the disallowance of the defense, when set up by a third party, would be to ultimately throw the loss on the payor, then the defense should be allowed; for in such case it is to the personal benefit and interest of the payor. To illustrate: If in this case Hall had made a general warranty deed, instead of a quitclaim, he would have been responsible on such warranty to the plaintiffs for the incumbrance, if they should be compelled to pay it, so that the defense of payment, which in that case should be interposed by these plaintiffs by proper plea, would inure to the benefit of the payor whom the statute intended to protect. This phase of the question was not considered in *Rice v. McFarland*, *supra*.

This is in keeping with the principle asserted in some quarters, that the equities of third parties are not available against the assignee, for, in the instances given, the parties are not properly third parties; they assert, by right, the defenses of the payor. Some of the authorities state the proposition in its full breadth and without qualification, that the equities of third parties cannot be allowed to affect the assignee; and such authorities, holding this extreme, are combated by others. But I know of none that permit the equity of third persons to affect the assignee when such equity is not, or cannot be, connected with the instrument or debt assigned. The case in 61 N. Y. 122 (*Trustees Union College v. Wheeler*), is an exhaustive and leading one on this subject, and it upholds the doctrine that equities of third persons are available against the assignee; but in that case it is expressly said that the doctrine extends only "to all dealings and acts on the part of the assignor towards those persons whose rights and interest are *embraced within the mortgage.*" And

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that it is not pretended that it will reach and protect those claiming "externally" to the mortgage. But the equities attempted to be set up by these plaintiffs are not such as are embraced within the mortgage; they are external to the mortgage; they are properly the equities of third parties against the mortgagee which have no relation or connection with the payor, since he merely quitclaimed or released whatever interest he had in the land covered by the mortgage. *It can make no possible difference to him what the result of the question may be*, for he has given no instrument which connects him with it in any way. The case in 22 N. Y. 548 (*Bush v. Lathrop*), was regarded as a strong one in support of the rule that equities of third parties would affect an assignee; but, even in that case, it was conceded that, if the third parties were those "who had dealt with the *original creditor*," their equities could not be set up against the assignee. The court said that "a purchaser (assignee) has no clue by which he can protect himself against the equities of (such) third persons." The same thing is held in *James v. Morey*, 2 Cow. 297. These considerations apply to the facts in the case at bar, and nothing in *Bush v. Lathrop*, applicable to the facts in this case, is against our position; whatever else appears in that case was overruled in *Moore v. Bank*, 55 N. Y. 41.

If Craig had retained the land it would unquestionably have been subject to the lien of the mortgage, for Craig could not, of course, claim that the note had been paid, or that the deed of trust was satisfied. So if Craig and his grantees, down to plaintiffs, had conveyed by quitclaim deeds the land would still have been liable to the lien of the deed of trust in the hands of either of them, for by holding under quitclaim deeds they could not claim to be innocent purchasers (*Hope v. Blair*, 105 Mo. 90), since the law does not require an

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assignment of a note and mortgage to be recorded. Our registry statutes permit one without actual notice who purchases for value to rely wholly upon the deed records, and the records of such purchase will give him the title against all equities or incumbrances not disclosed by such records. Now, does this case properly fall under the principles governing the registry acts as they affect titles? I think it does not. *James v. Morey*, 2 Cow. 296. Here the assignee, as we have seen, took the title to the note upon the assignment and delivery to her. This carried with it the mortgage security. By no act which she could take, or which the law required her to take, could she notify the successive grantees of Craig, including these plaintiffs. If she had done all that plaintiffs contend she should have done, that is, have given notice of the assignment to Hall, he (Hall) and Craig could still have done just what they did do. In other words, notice to Hall, which would be merely a private communication, would not and could not be notice to the grantees of Craig. It is plain that it is utterly impossible for the assignee of a mortgage to know with whom the mortgagee may subsequently deal in relation to the mortgaged premises. And so it is, therefore, said in *James v. Morey*, 2 Cow. 298, that there is not a case to be found in the books in which the principle of the equity of third persons has been applied to dealings between the mortgagee and third persons *since the assignment*. It is true that it is said that Craig's grantees could ask Hall if he had paid the note, and that they actually did ask him; but this can have nothing to do with the registry act, nor can it in any possible way be notice to others. *James v. Morey*, 2 Cow. 311.

So I consider that the registry statute does not affect the case. And the question finally is, which of the parties have the better equity: The assignee for

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value of a note who takes possession, but fails to give notice of the assignment to the debtor; or the grantees for value by warranty deed from the assignor of the land mortgaged to secure the note, such land having been quitclaimed to the assignor by the payor in payment of the note? There ought not to be any doubt that the assignee is in the better position. *First.* She has the prior right and title which cannot be taken from *her except by neglect of some duty owing by her to these grantees.* She owed them none. The only duty she owed at all was to the payor, and which, if performed as to him, would not necessarily have benefited these grantees. So conceding that Mrs. Eddy was put upon inquiry, by inquiring of Hall, the payor, what would she have learned? She would have learned that the discharge of Hall was by his releasing his equity of redemption to Craig, and this would not have altered the situation; for the mortgage would remain good in her hands against Craig. She would not have discovered anything which went to impair her security. *James v. Morey*, 2 Cow. 311.

By Hall releasing and quitclaiming the equity of redemption to Craig, the mortgagee, there was no merger of the two estates, as Craig, thus holding the two estates, had assigned his interest in one of them; equity would never permit a merger under such circumstances. 2 Washburn on Real Property, 564, sec. 1.

The fact, that Craig more than three years after he had assigned the note to Mrs. Eddy, and more than a year after the deeds of trust to Gilbert & Gay had been executed, made an entry of satisfaction of the Hall deed of trust on the margin of the record, can have no effect on the rights of the parties. *Rice v. McFarland*, *supra*, and authorities cited.

The judgment of the circuit court is affirmed. SMITH, P. J., concurs; GILL, J., dissents.

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SMITH, P. J. (*concurring*).—I shall express as shortly as I can the view which I entertain in respect to the principal question which has been discussed in this case by each of my associates. It is a general principle that a quitclaim deed is notice of pre-existing equities. But it is not notice of such equities as are required by the statute to be registered; that is, spread upon the records, except where given for value. *Stoffen v. Schroeder*, 62 Mo. 147; *Stevens v. Hume*, 62 Mo. 473; *Mann v. Best*, 62 Mo. 401; *Ridgeway v. Holliday*, 57 Mo. 444; *Campbell v. Gas Co.*, 84 Mo. 352; *Fox v. Hale*, 74 Mo. 315; *Andrews v. McPike*, 86 Mo. 293; *Sharp v. Cheatham*, 88 Mo. 498; *Munson v. Eddy*, 94 Mo. 504. Manifestly, the transaction between Hall and Craig, by which the former discharged the note, was a fraud on the part of the latter as to Mrs. Eddy's rights.

The facts constituting Mrs. Eddy's equities in part were that she was the owner and holder of the note under an assignment from Craig at the time of the transaction between Hall and Craig, and that, owing to the nature of such equities, they could not be spread upon the records, and were not, for that reason, within the registration statutes. It is not controverted that, as between Mrs. Eddy, the assignee, and Craig, the assignor in equity, the note and deed of trust remained unaffected by the discharge of Hall. Craig was estopped as against Mrs. Eddy to set up his fraud in discharging Hall.

Bartlett holds by mesne conveyances under the quitclaim deed from Hall to Seals, and, according to the authorities just cited, the former acquired the land subject to the pre-existing equities of Mrs. Eddy. Bartlett occupies in respect to Mrs. Eddy's equities precisely the same position that Craig or Seals did. He took the land with notice of the equities of Mrs. Eddy

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which suffered no impairment by the subsequent conveyances. Her equities are as available against Bartlett as they were against either Craig or Seals.

I, therefore, concur in the conclusion reached by Judge ELLISON.

GILL, J. (*dissenting*).—It seems the material facts of this controversy may be thus stated: On December 1, 1885, Hall executed to Craig a non-negotiable note of $700, due two years from date, and, to secure the same, Hall made a deed of trust on eighty acres of land. About six weeks thereafter, Craig, for value, assigned the note and security to defendant Eddy, who then was a non-resident, and who never gave any notice of the assignment to Hall. In October, 1887, Hall, believing Craig yet the owner of the note and mortgage, paid off the same by a reconveyance of the land to Craig (or rather to one Seals for Craig). From Seals through several intermediate conveyances, the said eighty acres was purchased by and the title lodged in plaintiff Bartlett. The parties from whom Bartlett purchased the land had secured the same in entire good faith, and after being advised by Hall and by Craig that the old note and deed of trust of Hall to Craig had been fully satisfied. In making these representations Hall was entirely innocent, but the bad faith and villainy of Craig throughout the whole transaction is manifest.

The matter for determination then is, who of these parties must suffer; shall it be Eddy, the holder of the Hall note and mortgage, or shall it be Bartlett, the, in fact, good-faith purchaser?

I. In this discussion let us assume this controversy to rest between Hall, the payor and mortgagor, and Eddy, the assignee thereof. Hall, without notice of Eddy's purchaser, paid Craig and took from Craig an acknowledgment of satisfaction of the debt and

mortgage. Since the assigned note was non-negotiable, the rights of the assignee Eddy, as well as the rights of the debtor Hall, are to be measured by the rule for the assignment of any ordinary chose in action. Now it is well-settled law, that, until the debtor receive notice of the assignment he may safely pay the debt to the original holder. R. S. 1889, sec. 8161; 1 Parsons on Contracts, 227, 229, 230; 3 Wharton on Contracts, 838, 842, 845, and numerous other authorities that might be cited. The books uniformly say that the assignee of a chose in action, in the absence of notice to the debtor, stands in the shoes of the assignor, subject to the same defenses. It was formerly required that the suit should be brought in the name of the assignor for the benefit of the assignee. But that the assignee may now sue in his own name has not, in the least, deprived the debtor of his defenses. "The assignee is still subject to the same equities as before; that is, if the defendant can show that he, in good faith, paid the debt, or a part of it, to the assignor before the assignment, *or before he had any knowledge of the assignment*, the defense is as effectual as if the action were in the name of the assignor. And if, after the assignment, *and previous to such notice of it*, the debtor pays the debt to the assignor, he shall be discharged, because he shall not suffer by the negligence or fault of the assignee." 1 Parsons on Contracts, 350.

It is clear, then, if this was a suit on the debt by Eddy, the assignee, against Hall, the debtor, it would be a good defense that Hall, before the notice of the assignment, had paid Craig, the assignor. And it would seem equally manifest that such payment to Craig would, likewise, bar an action for the foreclosure of the mortgage. The debt and the mortgage are for this purpose, at least, inseparable. "When the note is

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paid, the mortgage expires." 1 Jones on Mortgages, sec. 840; 2 Jones on Mortgages, sec. 1487; *Carpenter v. Logan*, 16 Wall. 275; *Hagerman v. Sutton*, 91 Mo. 531; *Johnson v. Johnson*, 81 Mo. 336.

II. But it is contended, on the faith of *Rice v. McFarland*, 34 Mo. App. 404, that the payment of the debt by Hall to Craig after the assignment to Eddy, but *before notice of such assignment*, was not, strictly speaking, a payment and satisfaction of the debt, but that the debt remained to support the mortgage security then in the hands of the assignee; that, while Eddy could not enforce the *note* against Hall (because of the payment to Craig before notice), yet that the mortgage security remained intact and enforceable in the hands of the assignee, Eddy. It seems to be the notion that from Hall's payment to Craig (when he thought and had the right to conclude Craig still the owner of the note and mortgage) a sort of undefined equity arose in Hall's favor, which would serve to defeat Eddy's action on the note, but would not destroy a right to enforce the mortgage. After a very thorough investigation and consideration of the authorities, I feel that we ought to recede from the position thus practically taken by us in the above-cited case. If, when Eddy took from Craig an assignment of the debt and mortgage, it was intended to deprive Craig of the power and authority to receive payment thereof, it was the duty of Eddy to give notice of the assignment to Hall, so that he would not be deceived into paying to the wrong party; and, until such notice was given (or Hall was in some way informed), he [Hall] was justified in regarding Craig still the owner, or as agent of the owner, and a payment by him under such circumstances was a payment to the agent of an undisclosed principal. 2 Wharton on Contracts, sec. 342. By taking an assignment of the debt and mortgage from Craig, but failing

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to notify the debtor, Craig remained, under the law, the trustee or agent of the assignee to receive payment of the debt. And, when he received such payment from Hall, it was a complete and entire satisfaction of the debt to the same extent as if he had paid to Eddy direct. The object the law has in view in requiring the assignee of a chose in action to warn the debtor of his purchase is to protect the debtor from double payment. What protection would it be to the debtor, if after paying the mortgage debt to the assignor, he could be compelled to pay again on the mortgage? The very purpose of the law would be thereby nullified. The payment thus made by the unadvised debtor must of necessity result in the extinguishing of the debt. He *has paid the debt*, if not to the rightful owner, yet to the one authorized under the law to receive it. If Eddy did not intend to trust Craig with the collection of the debt from Hall, the way was plain; she should have notified Hall of her ownership. Failing in this, Hall could not suffer from her negligence. The debt then was *paid;* and, the debt being extinguished, the mortgage security on the land perished with it. In addition to the authorities, *supra*, see also *Hodgdon v. Nagler*, 5 Serg. & R. 217; *Bury v. Binkley*, 4 Serg. & R. 177; *Brindle v. McIlvaine*, 9 Serg. & R. 74; *VanKenren v. Corkins*, 66 N. Y. 77–80; *Trustees, etc., v. Wheeler*, 61 N. Y. 88–115; *Howard v. Gresham*, 27 Ga. 347–351; *Greene v. Warnick*, 64 N. Y. 220; *Miller v. Bomberger*, 76 Pa. St. 78.

III. The rule in this state that, though an action on the debt be barred by the statute of limitations, yet a suit on the mortgage may be maintained (*Wood v. Augustine*, 61 Mo. 51; *Booker v. Armstrong*, 93 Mo. 58) does not impair the position taken in this case. The barring of an action by the statute of limitation is not *payment of the debt*. It only affects the *remedy*, the

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debt still remains. 2 Hill on Mortgages, sec. 29; 2 Jones on Mortgages, sec. 1203; *Thayer v. Mann,* 19 Pick. 535, 537.

IV. Some reference is made to section 2390 (R. S. 1889) as denying to Craig, before notice to Hall of the assignment, power to accept payment or satisfaction of the debt. Said section reads: "It shall not be in the power of the assignor of a demand, after the assignment, to release any part of it," etc. It would seem that this section of the statute was not intended to reach a case like this, where, though there was an assignment of the demand as between the assignor and assignee, yet it was not effective as against the debtor without notice. However, any doubt must be put at rest when section 8161, Revised Statutes, is considered. That statute reads: "In actions on assigned accounts and non-negotiable instruments, the defendant shall be allowed every just set-off or *other defense* which existed in his favor at *the time of his being notified of such assignment.*"

As opposed to this view some reference is made to the case of *Bates v. Martin* (3 Mo. 367) and *St. Louis Perp. Ins. Co. v. Cohen* (9 Mo. 421). These cases are correctly quoted as holding that payment of a non-negotiable note by the debtor to the payee, but after an assignment to a third party (of which the debtor had no notice), is no defense to the maker of the note in a suit by the assignee. But, as to what weight should be given these cases, it must be remembered that they were decided on the peculiar condition of the statute law at that time. The then statute law of Missouri in express words took the matter of assigned bonds and notes out of the general rule applicable to the assignment of other choses in action, and only left the obligor or maker the right to set up the defenses he had *when the assignment was made.* R. S. 1825, p. 143; R. S.

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1835, p. 105; R. S. 1845, p. 190. But, incited thereto probably by these decisions, the common-law rule was soon thereafter restored by our law-makers; and the obligor or maker of an assigned non-negotiable note was permitted every set-off or other defense which he had *when he received notice* of the assignment. Acts, 1849, sec. 3, p. 75. This section first appeared in the act establishing our code of practice. It was then carried down into the revision of 1855, under title of "bonds, notes and accounts" (R. S. 1855, p. 322); and then in the revision of 1865 appears in the chapter on set-offs (Gen. Stat. 1865, p. 602), and is found in the present revision under the same title. R. S. 1889, sec. 8161.

As I read these cases and this legislation, the law, as it was under the old statutes, has been changed, and the common law as it was before the act of 1825 practically restored. And we have it now as expressed by Judge SCOTT in *Ins. Co. v. Cohen, supra* (9 Mo. 442): "As to choses in action or paper non-negotiable the assignee takes it subject to all the defenses the maker may have against it before notice of the assignment. To the assignee of the chose in action, the rule *caveat emptor* applies. * * * An assignment operates *per se* as an equitable transfer of the debt. Notice is indispensable to charge the debtor with the duty of payment to the assignee, so that if without due notice he pay the debt to the assignor he will be discharged from the debt." *Murdoch v. Finney*, 21 Mo. 139.

It, therefore, results from the foregoing considerations that Hall's payment to Craig had the effect not only to satisfy the debt, but as well to extinguish the mortgage security on the land now held by Bartlett. In thus deciding we are not forced to concede this defense as available to Craig, when he subsequently procured the title. For it may be well said that he,

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because of his fraud, would be estopped to set up a discharge procured by his own bad faith. But, as to the subsequent purchasers of the land, who acted in entire good faith, and with knowledge of Hall's payment, etc., they occupy the same advantageous grounds, and are entitled to like consideration in law and equity as if the land yet remained with Hall.

In my opinion, then, the judgment, on the agreed statement of facts should have been for plaintiff, and not for defendants; and, therefore, I must dissent from the opinion of my associates.

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SAMUEL S. SMITH, Respondent, v. THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAILROAD COMPANY, Garnishee, etc.; JAMES CRAIG, JR., Interpleader and Appellant.

Kansas City Court of Appeals, April 4, 1892.

Garnishment: EFFECT OF REVERSAL OF ATTACHMENT JUDGMENT. Where the judgment sustaining the attachment is reversed, a judgment against a garnishee of the attachment defendant in a contest with an assignee of such defendant should also be reversed.

Appeal from the Buchanan Circuit Court.—HON. A. M. WOODSON, Judge.

REVERSED AND REMANDED (*with directions*).

Stephen S. Brown and *Simmons, Keller & Castle*, for appellant.

The same facts were before this court in *Smith v. Exposition Ass'n*, 47 Mo. App. 462, and the same point was necessarily and fully decided in that case.

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No brief for respondent.

Per Curiam.—The judgment of the Buchanan circuit court, sustaining the attachment in the cause in which these proceedings were taken, was brought to this court by appeal, and was, at the last term, reversed without being remanded. 47 Mo. App. 462. Under the writ of attachment in that case, the Kansas City, St. Joseph & Council Bluffs Railroad Company was, on the fifth day of October, 1890, summoned as garnishee, and answered as follows:

"Garnishee further states that, prior to the date of the service of garnishment process therein, an arrangement or agreement was entered into between the defendant, this garnishee, whereby garnishee provided and sold tickets over its railroad having attached coupons, which, under said agreement between the above-mentioned parties, entitled the purchaser to admission into the exposition.

"That, at the date of the service of garnishment herein, this garnishee had, under the above-mentioned agreement, sold a large number of such coupons attached to its railroad tickets, and at said date had in its possession $500 arising from the proceeds of the sales of such coupons for admission to said exposition.

"That one James Craig, Jr., claims that said sum remaining in the hands of this garnishee, arising as the proceeds of the sale of coupons for admission into said exposition, has been assigned and transferred by said exposition company to him; that such assignment was made prior to the date of the service of this garnishment upon this garnishee, for a valuable consideration; that he is entitled to receive and receipt for the money so held by this garnishee, and said Craig has caused the following notice to be served upon this garnishee by the sheriff of this county, to-wit:" (The answer

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then sets out the contents of a written notice served by Craig upon the garnishee, stating his claim to the money and the facts upon which it was based.)

Mr. Craig interpleaded, claiming the money, and this appeal is from the judgment of the court upon this interplea, which was against the interpleader. The original attachment suit upon which the garnishment herein is founded was decided by this court at last term, wherein we reversed the judgment of the trial court, sustaining said attachment. That case really determines this. An examination of the record satisfies us that the judgment below should have been for the interpleader, and we will reverse the judgment and remand the cause with directions to enter judgment for him.

BURNHAM, HANNA, MUNGER & Co., Respondents, v.
49 56 59 616 MAX BLANK *et al.*, Appellants.

49 56 150m630 **Kansas City Court of Appeals, March 7, and April 4, 1892.**

1. **Attachment:** RIGHTS AND PRIORITIES. The rights and priorities of attachment creditors, as between themselves, are matters of strict law. If the first attacher once loses his lien, the rights of the junior attachers intervene and take precedence. The execution lien must be traced through the usual course of judicial procedure to the original levy under the writ of attachment.

2. ——— : ——— : CONFESSION OF JUDGMENT. S. sued out his writ of attachment in due form against M. Subsequently B. likewise duly brought attachment against M. Before the return term of these writs, S. secured from M. a confession of judgment in statutory form, on which the court entered judgment by confession, reciting therein that it was upon a statement in writing for confession of judgment, but without any reference to the attachment suit or property. *Held*, the execution on S.'s judgment should be postponed to the execution on B.'s judgment which was obtained in the usual course.

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Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

AFFIRMED.

STATEMENT by the court:

EXHIBIT A.

Confession of judgment:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

"Mary Samter, Plaintiff, *v.* "Max Blank, Defendant. } No. 10860.

"*First.* The amount for which judgment may be rendered against me in favor of Mary Samter is $500, and interest accrued thereon, $12.45, making in all $512.45, and I authorize judgment to be entered against me for $512.45 in the above cause.

"*Second.* The fact out of which the above indebtedness arose are as follows: I, Max Blank, being in the mercantile business at number 1428, East Eighteenth Street, Kansas City, Missouri, borrowed from Mary Samter the sum of $500 to pay certain liabilities I had incurred in said business; that the said sum of $500 was used in paying for goods that were purchased and used by me in said business at the above number; that at the time I borrowed said sum of $500 from Mary Samter I executed and delivered to her five $100 notes, due in one, two, three, four and five months from their date, viz., September 1, 1887; that none of said notes have been paid by me, or any part of said sum of $500, and that the same is now justly due the said Mary Samter; that all of said notes are not now due; that said notes bear interest from date at the rate of ten per cent. per annum. MAX BLANK.

"Witness: EUGENE SCHILLING."

"STATE OF NEBRASKA, }
"County of Saline. } ss.

"Max Blank, being duly sworn, on his oath deposes and says: That the facts set forth in the foregoing statement are true.

"[Signed] MAX BLANK.

"Subscribed and sworn to before me this third day of December, A. D. 1887.

"My commission expires October 26, 1892.

"[Notary Seal.] EUGENE SCHILLING,
"Notary Public."

Said confession of judgment was indorsed as follows:

"No. 10860. Mary Samter *v.* Max Blank, confession of judgment. Filed December 5, 1887.

"L. F. McCOY,
"Clerk.

"By J. S. CHASE,
"Deputy Clerk."

EXHIBIT B.

Copy of judgment entered on said confession of judgment:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, Monday, December 5, A. D. 1887.

"Mary Samter, Plaintiff, }
v. } No. 10860.
"Max Blank, Defendant. }

"Now at this day comes plaintiff, by attorney, and files a statement in writing for confession of judgment made and signed by the defendant and verified by his affidavit to the following effect: Stating the amount of $512.45 for which judgment may be rendered, and authorizing the entry of judgment thereon, and stating concisely the facts out of which the money due or to become due arose, and showing that the sum confessed

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therefor is justly due or to become due. And the court being satisfied that the said defendant executed the said statement in writing and made the affidavit required thereto, it is, therefore, considered and adjudged by the court that said plaintiff have and recover of and from the said defendant the sum so confessed, with interest thereon at the rate of ten per cent. per annum, the rate specified in the notes mentioned in the statement, together with the costs of suit incurred and expended, and have thereof execution."

E. C. Mapledoram and *Jas. A. Reed*, for appellants.

(1) After service on defendant of writ of attachment, the cause of Samter *v.* Blank stood as it commenced by summons only, R. S. 1889, sec. 560; *Huxley v. Harold*, 62 Mo. 50. (2) The defendant Blank having consented thereto, judgment was properly entered in the case of Samter *v.* Blank before the return day of the writ. 3 Blackstone's Commentaries, 213, 223, 225; Tidd's Practice, 606; R. S. 1889, secs. 2191, 2192; *White v. Bogard*, 73 N. Y. 256; *Boyd v. Carpet Co.*, 38 Mo. App. 203; *Chamberlain v. Mining Co.*, 20 Mo. 96; *Adler v. Anderson*, 42 Mo. App. 189. (3) It is admitted in the agreed statement of facts that the confession of judgment was numbered and filed, and that judgment thereon was entered, in the attachment cause of Samter *v.* Blank. (4) After process had been served on defendant, the statute for confession of judgment could not apply. *Gilbert v. Gilbert*, 33 Mo. App. 267; *Boyd v. Carpet Co.*, 38 Mo. App. 203; *Adler v. Anderson, supra; Crouse v. Derbyshire*, 10 Mich. 479; *Davis v. Wood*, 7 Mo. 162. (5) There having been no proof of fraud, the court in this proceeding had no jurisdiction to postpone the lien of the judgment in the attachment cause of Samter *v.* Blank beyond the lien of plaintiffs' judgment. The parties to the judgment

not complaining, strangers cannot. *Gilman v. Hovey*, 26 Mo. 289; *Gates v. Tusten*, 89 Mo. 14. (6) The order of the court in the case of Schwartz *v.* Blank, requiring the sheriff to pay money to Schwartz, having been complied with, is effectual and conclusive in Schwartz's behalf.

Karnes, Holmes & Krauthoff, for respondents.

(1) The question involved stands answered in the affirmative by rules which have the sanction of all the authorities on the subject. *Gilbert v. Gilbert*, 33 Mo. App. 259, 265, 267; *Murray v. Eldridge*, 2 Vt. 388, 392; *Clark v. Foxcraft*, 7 Me. 348, 351; *Cole v. Worcester*, 2 Conn. 203, 205; *Suydam v. Huggerford*, 23 Pick. 465, 472; *Iron Co. v. Gleeson*, 24 Vt. 228, 235; *Lowery v. McGee*, 75 Ind. 500, 510. It is universally held that the result is such that subsequent attaching creditors can take advantage of the same. *Bank v. McDonald*, 46 Mo. 31, 33; *Stone v. Miller*, 62 Barb. 430, 443; *Alley v. Myers*, 2 Tenn. Ch. 206, 210; Dràke on Attachment [7 Ed.] sec. 262; *Gilbert v. Gilbert*, 33 Mo. App. 259, 265; *Pond v. Davenport*, 44 Cal. 481, 486. (2) The order of the court made in the Schwartz case was without effect on these plaintiffs, for the conclusive reasons they were no parties to it; were not notified of the motion on which it was based; and are not even mentioned in the entry. *Edwards v. Smith*, 27 Pac. Rep. 809.

Ellison, J.—Plaintiffs are subsequent, and defendants are prior, attachment creditors of a common debtor. Defendants' suits were regularly instituted, process was regularly issued and levied upon the attached property, as well as regularly served upon the (defendant) debtor. Before the term at which the writ was returnable, the debtor made a confession of

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judgment, regular in all respects as provided by sections 2229 to 2231, Revised Statutes, 1889. *Judgment was entered on this confession* as provided by the latter section, reciting that it was upon "a statement in writing for confession of judgment." No reference was made, either in the confession or judgment, to the attachment suit or property, though they both bear a number corresponding to the number of the docket. Execution issued on this judgment, and was ordered satisfied out of the proceeds of the property which had been sold by order of the court.

This proceeding by the subsequent attaching creditors is, in effect, to postpone and nullify the attachment lien of the prior attaching creditors, and the question for our decision is, does the confession of judgment made and rendered as above shown have the effect of discharging the property from the prior attachments so as to let in the subsequent attachments? We think it does.

"The rights and priorities of attaching creditors, as between themselves, are matters of strict law. If the first attacher once loses his lien, the rights of the junior attachers intervene, and the lien of these attachments takes precedence." *Adler v. Anderson*, 42 Mo. App. 189. And this, without regard to the good or bad faith of the parties. *Adler v. Anderson, supra.* "The rule is that the plaintiff must be able to trace his execution lien through the usual course of judicial procedure to the original levy under the writ of attachment." The rendition of a judgment in due form and course of law, and the issuing of an execution on that judgment, and duly charging the property therewith, are as necessary as the attachment itself. Drake on Attachments, sec. 262. I have not found where the foregoing statements of the law have been controverted. It necessarily follows from the foregoing propositions, that the judgment

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rendered must be founded upon, and be the result of, the original process of attachment. If the judgment taken is not such, then the acceptance of such other judgment must be considered as (in effect at least) an *abandonment* of the proceedings under the attachment writ. In the case at bar, the judgment taken is not founded on the original process. It is a formal judgment by confession. The confession is statutory in form, and the judgment entered is *based* on this. There is not even an indirect reference to a pending action of any sort. There is no reference to service of process or appearance of the debtor defendant. The court does not render the judgment upon the appearance of defendant, or by reason of service of process, but merely from "being satisfied that the said defendant executed the said statement in writing and made the affidavit required thereto." I am fully persuaded that the judgment rendered stands entirely apart from, and independent of, the process in the cause. It is contemplated that in a judgment by confession there will be no action instituted by original process, but I do not understand that a judgment by confession cannot be had merely because an action was pending for the same debt.

It is suggested that an offer of judgment under section 2191, Revised Statutes, 1889, after the institution of an action and an acceptance thereof followed by a judgment thereon even though before return day of the writ will not affect the lien of the first attachment. It was so held in *Boyd v. Furniture Co.*, 38 Mo. App. 210, and we fully coincide in that decision. But in that instance the judgment is founded upon the process issued, and could not be rendered without process first had. It is merely a mode authorized by statute of obtaining judgment on the original process and obviates proof of what is admitted by the offer. It is no

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more, in effect, than if the admission was made by answer, or than if the defendant on trial had admitted his indebtedness.

The objection to plaintiffs' mode of attacking the proceeding cannot be allowed at this stage.

We will affirm the judgment. All concur.

CAROLINE D. PRATT and her Husband, Appellants, v. THE HOLMES STREET RAILWAY COMPANY *et al.*, Respondents.

Kansas City Court of Appeals, March 7, and April 4, 1892.

1. **Kansas City**: GRADE OF HOLMES STREET: BELT LINE ORDINANCE. A plane extending from the grade of Nineteenth street, seventy-seven feet above the city directrix, to the grade of Twentieth street as established by the Belt Line ordinance, eighty-seven feet above the city directrix, describes the grade of Holmes street between these two streets.

2. **Streets**: CHANGE OF GRADE: DAMAGE: ESTOPPEL. The raising of the grade of a street so that the surface thereof shall be above the abutting property of the plaintiff, which had been improved with reference to the original grade, would entitle plaintiff to recover for any resulting damage to his property; but where the plaintiff, as in this case, besought the defendant to grade the entire street to the then established grade defendants are not liable for the resulting damages.

3. ———: RULE TO DETERMINE GRADES BETWEEN STREETS. As a matter of law the grade of an intersecting street between two adjacent parallel streets bounding the same block is a true plane between the elevations of the two parallel streets.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

AFFIRMED.

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Chas. E. Pratt, *W. J. Ferry* and *Frank Hagerman*, for appellants.

(1) As was conceded below, and will undoubtedly be conceded here, appellants had a case unless the respondents graded the street to the then established grade as petitioned. *Sheehy v. Railroad*, 94 Mo. 574. (2) By established grade is meant that fixed by the records of the council. *Kepple v. Keokuk*, 61 Iowa, 653. (3) The grade of the street in front of plaintiffs' property, as established by ordinance number 8436, approved March 20, 1873, and number 20513, approved February 8, 1881, was a plane drawn from a height of seventy-seven feet at the south line of Nineteenth street to eighty-three feet at the north line of Twentieth street. This subject is exhaustively considered in Sutherland on Statutory Construction, secs. 307, 308, 309. (4) Considering the Belt Line ordinance, number 22948, in the light of the rules of law just stated, there can be no question but that we correctly construe it. However, as an independent, open question, there is no doubt about its meaning. It is to be presumed that all parts are intended to harmonize (Sutherland on Statutory Construction, secs. 215, 325); and effect must be given to every part of the ordinance (secs. 239, 240), and inconsistent provisions must be harmonized if possible (secs. 239, 260). (5) Now, respondents' whole claim must rest upon the idea that the Belt Line ordinance changed the grade of Holmes street at the north line of Twentieth street, and that this necessarily changed the plane from that point. This claim is based upon *Conklin v. Keokuk*, 73 Iowa, 343. But, as we have seen, the grade was not changed by the Belt Line ordinance at the north line of Twentieth street; so the claim is not tenable. (6) When one ordinance fixed a grade at the north line of Twentieth street and another fixed it at

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the south line, no grade was established between these points. This was expressly decided in *Dorland v. Bergson*, 78 Cal. 637; s. c., 21 Pac. Rep. 537. The result is that, until the Belt Line ordinance was passed, there was no grade of Holmes street across Twentieth street; but when such ordinance was passed the grades as theretofore established at the north and south lines of Twentieth street were made to connect by planes meeting at the level of the railroad tracks by such an approach as was reasonably practicable.

Karnes, Holmes & Krauthoff, for respondents.

(1) Contrary to the contention of counsel for appellants, the Belt railway ordinance established the grade of both Holmes and Twentieth streets at their intersection for their full width at eighty-seven feet above the city directrix, and not simply so much of Twentieth street as constituted the roadbed of the railway. Ordinance, sec. 3. (2) But the grade of Holmes street was raised at Twentieth street by the very terms of the Belt railway ordinance itself. (3) Since this brief was printed, certain interlineations have been made in the brief for appellants at pages 27, 31, 32. Those interlineations in effect admit away appellants' position, because they thus concede that by the Belt railway ordinance the grade of Holmes street north of Twentieth street was changed, at least so far as to require the building of a practicable approach to the new grade of Twentieth street as raised and established by that ordinance. How many feet will this court say that, by the requirements of the Belt railway ordinance, such practicable approach should be extended north from Twentieth street along Holmes street? Any change whatever wrought in the grade of Holmes street by that ordinance being conceded, there

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can be no escape from our contention that the change so wrought extended north all the way from Twentieth street to the next established elevation, which is the south line of Nineteenth street. *Conklin v. Keokuk*, 73 Iowa, 343, 348; *Gafney v. San Francisco*, 72 Cal. 146, 152. (4) If what we have said is sound, the established grade of Holmes street in front of Mrs. Pratt's property was correctly assumed by the respondents to be a plane from an elevation of seventy-seven feet above the city directrix at the south line of Nineteenth street to an elevation of eighty-seven feet at north line of Twentieth street. As a matter of law the grade of an intersecting street between adjacent parallel streets bounding the same block is a true plane between the elevations of the two adjacent parallel streets. *Conklin v. Keokuk*, 73 Iowa, 343, 348; *Gafney v. San Francisco*, 72 Cal. 146, 152. The case of *Dorland v. Bergson*, 78 Cal. 637, cited by counsel for appellants, neither contravenes the above proposition, nor is it authority for the proposition to which it is cited. (5) The cable railway was built and the street graded precisely as contemplated and intended by Mrs. Pratt, and hence she cannot complain.

SMITH, P. J.—This is an action by plaintiffs for damages alleged to have been sustained by their property at the northeast corner of Twentieth and Holmes streets in Kansas City from the building of defendant's cable railway and grading of the last-named street.

Plaintiffs and others owning property on Holmes street petitioned the defendant to construct and operate a street railway on that street to be run by endless cable from Fifteenth street to the southern boundary of Kansas City, and proposed to procure for the defendant a franchise for that purpose, provided they would "grade the entire street to established grade."

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Accordingly the franchise was procured, and the grading was done and the street railway built and put in operation.

Plaintiffs' property is situated on the north side of Twentieth street. The grade of Holmes street was originally established by ordinance, number 8436, approved March 20, 1873, from Independence avenue to the north line of Twentieth street, and by ordinance, numbered 20513, approved February 8, 1881, from the south line of Twentieth street to the southern city limits. By those two ordinances the grade of Holmes street at the north and south lines of Twentieth street was established at eighty-three feet above the city directrix, and so remained until the passage of the so-called Belt railway ordinance, approved August 19, 1882. Holmes and Twentieth streets intersect each other at right angles, and this Belt railway ordinance raised the grade of Twentieth street between the east and west lines of Holmes street from eighty-three feet to eighty-seven feet above the city directrix, and provided specifically that "*the intersections shall be deemed to be the intersections of the north and south lines of Twentieth street with the east and west lines of other or cross streets and avenues mentioned. Said intersection points shall be connected with true planes between each two adjacent points, which planes shall be the grade of Twentieth street.*" The ordinance makes the following further provisions with respect to the grades of the cross or intersecting streets: "The establishment of grade aforesaid shall not be deemed establishing grades of streets, avenues and alleys crossing said Twentieth street. The railroad of said Kansas City Belt railway shall be laid on Twentieth street with *upper surfaces* of the rails on *the grade so established*. The grade of the streets hereinafter mentioned *shall connect, crossing Twentieth street* either at grade, above grade or below grade of such

railroad, at all the streets or avenues mentioned in this section, as follows, to-wit: "Woodland avenue, over the grade of the road; Forest avenue, under the grade of the railroad; *Holmes street at the grade of the railroad.*" The cable railway ordinance was approved July 3, 1882. It is conceded that the cable railway of defendants was built and Holmes street was graded on a plane from the established grade of Holmes street at the south line of Nineteenth street to the elevation of the north line of Twentieth street as established by the Belt railway ordinance.

After the introduction of evidence by the plaintiffs, tending to show the facts which we have stated, the defendants objected to the introduction of any further evidence upon the ground that under the petition and ordinances the defendant had simply done what it was asked by the plaintiffs to do, which objection was sustained, plaintiffs duly excepting thereto.

The plaintiffs on account of the rulings of the court took a nonsuit with leave to set the same aside. And after an unsuccessful motion for that purpose they prosecuted their appeal to this court.

I. Whether the judgment which is drawn in question by the appeal shall be affirmed or reversed, depends upon the construction of section 6 of the ordinance, granting defendants' franchise, which requires that wherever Holmes street has not been graded the same shall be "graded to the established grade" the full width thereof. What was the "established grade" to which the street was to be brought at the point where it was intersected by Twentieth street? By said ordinances of March 20, 1873, and February 8, 1881, the grade of this street at the north and south lines of Twentieth street was established at eighty-three feet above the city directrix. Whether or not this state of the ordinances left that part of the street between the

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north and south lines of Twentieth street without any established grade, we think, is immaterial.

By the third section of the Belt railway ordinance, approved August 19, 1882, it was provided that the grade of *Twentieth* street in said city is established and shall be elevated above the city directrix, at the intersection of Holmes street, eighty-seven feet. It further provides that the intersections therein mentioned shall be deemed the intersections of *north and south lines of the cross streets.* Said intersection points shall be connected with true planes between each two adjacent points which planes shall be the grade of Twentieth street. Four "intersection points" are thus fixed by the ordinance on the intersecting boundary lines of the two crossing streets, located at the four corners of a parallelogram, and when the adjacent points are connected by true planes as required by the ordinance we have the plane which the ordinance designates as the grade of Twentieth street, which is a true plane the full width of Twentieth street, extending from the east to the west line of Holmes street at an elevation of eighty-seven feet above the city directrix. Since that part of Holmes which lies between the north and south lines of Twentieth street is precisely the same as that part of Twentieth street which is embraced within the east and west lines of Holmes street, it necessarily follows that an ordinance which establishes the grade of Twentieth street as a plane extending its full width between the east and west lines of Holmes street, likewise establishes the grade of Holmes street, as a plane extending its full width between the north and south lines of Twentieth street.

By the said provisions of the Belt railway ordinance the grade of Holmes street, between the north and south lines of Twentieth street, was raised from eighty-three to eighty-seven feet above the city direc-

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trix. Thus was the original grade of Holmes street where the north and south lines of Twentieth street cross it, as established by the ordinance of 1873, and 1881, disestablished by the passage of the Belt railway ordinance. The grade at the north line of Twentieth street was raised four feet above the original grade. A plane extending from the grade of Nineteenth street, seventy-seven feet above the city directrix, to the grade of Twentieth street as established by the Belt Line ordinance, eighty-seven feet above the city directrix, describes the grade of Holmes street between these two streets. The city under the constitution was authorized to make this change of grades, and, if the change caused the abutting property to be damaged, there would be a legal liability therefor. *Sheehy v. Railroad*, 94 Mo. 574.

The grading of Holmes street to the grade established by the Belt railway ordinance necessarily raised the surface of that street above the abutting property of the plaintiffs, which had been improved with reference to the original grade on Holmes street, and if damages resulted to the plaintiffs' property in consequence of the change of the grades, as no doubt was the fact, they would be entitled to recover therefor, were it not that they besought the defendants by their petition to grade the entire street to "the *then* established grade" of the street, as we have seen, where intersected by Twentieth street, prescribed by the Belt railway ordinance. The defendants graded the street to this grade, and for the consequence resulting therefrom to the plaintiffs' property for the reasons just stated defendants are not liable.

The contention of the plaintiffs, that the Belt railway ordinance provided that the grade of Holmes street should connect at the *level of the railroad track* crossing it on Twentieth street, cannot be sustained for the very reason that the grade of Twentieth street was

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established for its *full width*, and not merely for the width of the railway track thereon. Nor do we think, that under the ordinances of 1873, and 1881, that there was no provision made for a grade in that part of Holmes street, between the north and south line of Twentieth street; but if so then provision was made for the establishment of a grade there by the subsequent passage of the Belt railway ordinance. We think that the Belt railway ordinance had the effect to accomplish a change of the grade of Holmes street on that part thereof between the north and south lines of Twentieth street, and that a plane extending from the north line of the latter, eighty-seven feet above the city directrix, to the next parallel street, was the grade between these streets.

It is expressly provided in the ordinance of March 20, 1873, establishing the grade of Holmes street from Independence avenue to Twentieth street, that "all adjacent grade points as herein established shall be connected by true planes." Raising the elevation to eighty-seven feet at the north line of Twentieth street did not, of course, affect that provision, but left it in full force applicable to the new grade the same as the old. As a matter of law the grade of an intersecting street between adjacent parallel streets, bounding the same block, is a true plane between the elevations of the two adjacent parallel streets. *Conklin v. Keokuk*, 73 Iowa, 343, 348; *Gafney v. San Francisco*, 72 Cal. 146, 152. The plane fixed by the Belt railway ordinance on Holmes street, between the north and south lines of Twentieth street, connected the planes north and south of it and thus supplied the break, if any, in the continuity of the grade of Holmes street.

We can discover nothing in any of the ordinances to justify the conclusion that it was intended that the grade of Holmes street where crossed by Twentieth

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street should be elevated to eighty-seven feet for the width only of the Belt railway track, and that the plane north to the grade of Nineteenth street should begin and extend from the railway track instead of from the north line of Twentieth street, to the grade of Nineteenth street. Nor do we see any ground for the contention that the Belt railway ordinance contemplated that the old grade on the north line of Twentieth street should remain undisturbed, and that from the grade of that line to the level of the track of the Belt railway there should be constructed such an approach as was reasonably practicable. It is unreasonable to suppose the city government designed by the passage of the Belt railway ordinance to authorize anything of the kind. We must think when the defendants graded Holmes street and constructed the roadbed of their railway on a plane from the grade of Nineteenth street seventy-seven feet above the city directrix to the grade of Twentieth street as fixed by the Belt railway ordinance eighty-seven feet above the city directrix, that defendants thereby brought said street to the "established grade," and that this complied with the request of the plaintiffs and the requirements of the ordinance authorizing the same.

It follows, therefore, the circuit court did not err, and that its judgment should be affirmed. All concur.

KANSAS CITY, Respondent, v. CARRIE NEAL AND E. A. STEPHENS, Appellants.

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Kansas City Court of Appeals, March 7, and April 4, 1892.

1. **Vagrants:** CHARTER OF KANSAS CITY: ORDINANCE. The state has granted Kansas City by its charter the express power to restrain and punish vagrants, and to define who shall be considered vagrants, and the provisions of the city ordinance in relation to vagrants are in harmony with the state statute on the same subject, and the city may

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maintain a proceeding in its own name to impose and collect the fine imposed by such ordinance for its violation, though the ordinance was designed to reach certain vagrants not specifically embraced in the general statutes.

2. ——— : KANSAS CITY ORDINANCE: CRIMINAL OFFENSE. The offense defined in the Kansas City ordinance, relating to vagrants, is not essentially the same as that defined in section 3485, Revised Statutes, 1889, and the proceeding thereunder does not charge a criminal offense.

3. **Kansas City Charter:** POLICE JUDGE. The charter of Kansas City provides that there shall be a police judge, who shall have exclusive jurisdiction over all cases arising under any ordinance of the city, and he, therefore, has jurisdiction of an alleged violation of its ordinance relating to vagrants.

4. **Practice, Appellate:** CRIMINAL COURT OF KANSAS CITY: REVIEWING FACTS: PRESUMPTION. Section 2155, Revised Statutes, 1889, does not apply to the criminal court of Kansas City, and the appellate court will not reverse the criminal court in the absence of the evidence, as every presumption is in favor of the judgment.

5. **Kansas City Charter:** APPEALS: PENAL ACTION. The prosecution of a violation of the ordinance of Kansas City, relating to vagrants, is in its nature a civil action to recover a penalty, and the mode and manner of taking an appeal in such cases is by the terms and provisions of the charter and ordinance of the city prescribed by the statutes governing appeals in civil cases before justices of the peace.

Appeal from the Jackson Criminal Court.—HON. HENRY P. WHITE, Judge.

AFFIRMED.

Frank Titus, for appellant.

(1) The specific offense charged is that of being a vagrant, but the constituent facts alleged are at variance with such offense as defined by statute in section 8846, chapter 169, volume 2, Revised Statutes, and by section 3841, page 917, volume 1, Revised Statutes. The offense at which the ordinance of appellee seems aimed is declared a felony by section 3485, page 851, volume 1, Revised Statutes. The constitution of Missouri declares "such charter shall always be in harmony

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with, and subject to, the constitution and laws of the state." A city may by ordinance mitigate the punishment provided for an offense by statute, but should not increase such penalty. *State v. Cowan*, 29 Mo. 330, 334; *City of St. Louis v. Schoenbusch*, 95 Mo. 618; *Kinley v. State*, Texas Ct. App. 1891; 16 S. W. Rep. 339. (2) The ordinance upon which this prosecution is based provides for the punishment of the culprit after a conviction before the city recorder. The only existing charter of appellee makes no mention of such an official as "city recorder," and contains no provision to the effect that offenses formerly cognizable by the city recorder shall come before the police judge. A recognizance given under such a state of facts should not be enforced. *State v. Swope*, 72 Mo. 399, 404. (3) Upon the finding of the facts by the criminal court, its judgment is illegal. Desty on American Criminal Law, sec. 137. *Carpenter v. People*, 8 Barb. 603. (4) The judgment against Stephens is contrary to law. "At common law there is no authority to render any judgment against a party unless such party has a day in court. If such right exists in this state it can only be by plain, positive, statutory provision." In the case at bar appellant Stephens was not a party to the cause of City *v.* Neal; he had never had his day in court; there was no charge against him of any kind, and no statute exists authorizing such a summary judgment against a surety conjointly with his principal in criminal proceedings. 1 R. S., secs. 4328–4380, art. 12, p. 994 (*et seq.*). Assuming the recognizance to be valid or lawful, the surety complied with his obligation when his principal duly appeared, and no further duty rested upon him. *State v. Bobb*, 39 Mo. App. 543; *State v. Mackey*, 55 Mo. 51; *People v. Stager*, 10 Wend. 431; *United States v. Backland*, 33 Fed. Rep. 156; 1 Archbishop on Criminal Practice & Pleading, pp. 201, 202; *State v. Cobb*,

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44 Mo. App. 375. If, after conviction, defendant was permitted to escape, no liability accrues thereby against the surety. *State v. Rosseau*, 39 Tex. 614; *Moorehead v. State*, 38 Kan. 489; *Lyons v. State*, 1 Black. 308; *Keefaver v. Commonwealth*, 2 Pen. & Watts (Pa.) 240; *Commonwealth v. Coleman*, 2 Metc. (Ky.) 382; *Colquist v. Smith*, 65 Ga. 341; *Ogden v. People*, 62 Ill. 64; *Chase v. People*, 2 Col. 528; *State v. Bobb*, 39 Mo. App. 543; *State v. Randolph*, 22 Mo. 475. The judgment herein against Stephens should have been vacated, and the execution issued thereon against him quashed on his motion. *Newton v. Newton*, 32 Mo. App. 162. (4) In the case at bar the prosecution is not for the violation of a mere municipal by-law, such as failing to obtain a license or other offense not in its nature criminal, but for an offense which, aside from its designation, is in its nature a felony under our statutory law. If this prosecution is a mere civil suit, then the judgment complained of is yet more obviously illegal from lack of jurisdiction in the criminal court. Acts, 1871, sec. 2, p. 110. But the charter of Kansas City (sec. 17, art. 4) requires appeals in all cases tried before the police judge to be taken to the criminal court of Jackson county. *Q*. If this be a civil action, can a special city charter thus upset the established legal system of a state, and by mere *dictum* thus transform a court, the legislature declares a criminal court, into a circuit court, for purposes of a municipal and official revenue only?

Jas. W. Fraher, for respondent.

(1) The organic law of Kansas City gives express power "to restrain and punish vagrants," and "to define who shall be considered and treated as vagrants." Charter of Kansas City, 1889, art. 3, subdiv. 24 of sec. 1. It is valid because "the constituent facts alleged

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are not at variance with such offense as is defined by statute in section 8846, chapter 169, volume 2, Revised Statutes, and by section 3841, page 917, volume 1, Revised Statutes. The validity of an ordinance is not affected by the existence of a state law upon the same subject not inconsistent with it. *Ex parte King*, 10 Mo. App. 442; *City of Linneus v. Dusky*, 19 Mo. App. 20; *St. Louis v. Bentz*, 11 Mo. 61; *St. Louis v. Cafferata*, 24 Mo. 94; *Independence v. Moore*, 32 Mo. 392; *State v. Wister*, 62 Mo. 592; *State v. Harper*, 58 Mo. 530; *Ex parte Hollwedell*, 74 Mo. 395; *State v. Cowan*, 29 Mo. 330; *City of St. Louis v. Schoenbusch*, 95 Mo. 618. (2) The police judge had jurisdiction, because article 4, section 15, Charter Kansas City, 1889, *eo nomine*, provides for a police judge, etc.; and the same article, section 17, states "that he shall have exclusive jurisdiction over all cases arising under any ordinance of the city." Art. 17, sec. 1; R. S., sec. 1849, p. 501; Charter, art. 17, sec. 19, p. 129. (3) Upon the finding of the facts by the criminal court, the judgment is legal. To employ is to use as an instrument or means of effecting an object. *McCluskee v. Cromwell*, 11 N. Y. 605. Or to engage one's services. *People v. McKinney*, 10 Mich. 85. The object of "this employment" is stated in the finding, based on the proof, to-wit: "To procure for her several girls to become inmates of her (the defendant's) bawdy-house." *State v. Gordon*, 4 Mo. App. 1; *People v. Cook*, 61 Cal. 478; *State v. Round*, 82 Mo. 679; *State v. Freasel*, 74 Mo. 524. (4) The judgment against Stephens is not contrary to law. New Charter, art. 4, sec. 17, p. 27; Revised Ordinances, 1888, chap. 43, sec. 904, p. 328; *Given v. Sinclair*, 52 Mo. 327; *Powell v. Camp*, 60 Mo. 569; *Gray v. Dryden*, 79 Mo. 106. "A crime is an act committed in violation of a public law" (4 Blackstone's Commentaries, 5; "a law coextensive with the bounda-

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ries of the state which enacts it." "Such a definition is obviously inapplicable to a mere local law or ordinance passed in pursuance of, and in subordination to, the general or public law for the promotion and preservation of peace and good order in a particular locality," etc. *City of Kansas v. Clark*, 68 Mo. 588; *Williams v. City Council*, 4 Ga. 509; *City of Goshen v. Croxton*, 34 Ind. 239. "This proceeding is only a civil suit." *Piper v. City of Boonville*, 32 Mo. App. 138; *Town of Kirkwood v. Autenreith*, 11 Mo. App. 515; *Carrollton v. Rhomberg*, 78 Mo. 547; *Town of Memphis v. O'Connor*, 53 Mo. 468; 1 Dillon on Municipal Corporations [3 Ed.] secs. 408–413; *St. Louis v. Smith*, 19 Mo. 438; 74 N. Y. 406; 34 Iowa, 524; *City of St. Louis v. Vert*, 84 Mo. 204; *Greenfield v. Mook*, 12 Ill. App. 148; *Camden v. Block*, 59 Ala. 236; *City of De Soto v. Brown*, 44 Mo. App. 148; Horr & Bemis' Manual Police Ordinances, sec. 207, p. 187.

Smith, P. J.—The defendant, Carrie Neal, was tried and found guilty before the police judge of Kansas City, upon an information based upon section 1075 of the ordinances of said city. She took an appeal to the criminal court of Jackson county, and for that purpose with the other defendant, Stephens, entered into a recognizance conditioned as provided in sections 6328 and 6329, Revised Statutes, 1889. Upon a trial anew in the criminal court the defendant, Carrie Neal, was again found guilty, and judgment was rendered against her and the said Stephens, the surety on her recognizance, under the provisions of section 6549, Revised Statutes. From this judgment the defendant, Carrie Neal, did not appeal. The defendant Stephens filed a motion to set aside the judgment and to quash the execution issued thereon, which motion being overruled, he appealed.

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I. The appealing defendants assails the judgment on several grounds, the first of which is that the specific acts of vagrancy charged in the information do not fall within the statutory definition of that offense. R. S., secs. 3841, 3846, 3847. The English vagrants' act, statute 5, Geo. IV., as amended by 1 and 2, Vict. C. 38, form the basis of similar legislation in many of the states of the union. Our statutes, as will be seen by reference to the sections already referred to, are quite comprehensive on the subject of vagrants. Their specifications are much more extensive than those of the common law. 4 Blackstone's Commentaries, 169. The state has granted to the city by its charter, subdivision 24, section 1, article 3, the express power to restrain and punish vagrants and to define who shall be considered vagrants. It is not perceived that the provision of the ordinance of the city is in anywise out of harmony with the statutory provisions on the same subject. The rule is that when it can be seen that the exercise of any jurisdiction by the corporation can be clearly brought within the scope of the grant, without a violation of the constitution or a conflict with the laws of the state, there can be no objection to its exercise. *St. Louis v. Bentz*, 11 Mo. 61; *St. Louis v. Schoenbusch*, 95 Mo. 618. It has long been settled in this state that municipal corporations may by ordinance prohibit acts which are made misdemeanors under the general statutes of the state, and for a violation of such ordinances may maintain a proceeding in their own name to impose and collect a fine. *St. Louis v. Cafferata*, 24 Mo. 94; *State v. Cowan*, 29 Mo. 330; *Independence v. Moore*, 32 Mo. 392; *Ex parte Hollwedell*, 74 Mo. 395; *St. Louis v. Schoenbusch, supra; St. Louis v. Bentz, supra.*

The ordinance in question provides that any person misbehaving, as therein specified, shall be considered

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and treated as a vagrant, It was, doubtless, designed to reach certain vagrants not specifically embraced in the general statutes. *St. Louis v. Schoenbusch*, 95 Mo. 618. And it is, therefore, within the grant of the charter to define who shall be considered and treated as vagrants. It is at most a local regulation of the same subject not in conflict with the general statutes. The offense defined in the ordinance is not essentially the same as that defined in section 3485, Revised Statutes; that section does not relate to vagrants at all. Vagrancy, under the statute, is but a misdemeanor, and, therefore, according to the authorities already cited may be the subject of local regulation. The offense charged in the information was not a criminal offense in the meaning of the constitution. *Marshall v. Stanard*, 24 Mo. App. 192; *Ex parte Hollwedell*, 74 Mo. 395.

II. It is further contended that the police judge was without jurisdiction, for the reason that the ordinance on which the prosecution was based provides that the offender, "upon conviction before the recorder," etc. The answer to this is that section 15, article 4, of the charter, provides "there shall be a police judge," and section 17 of the same article further provides that he shall have exclusive jurisdiction over all cases arising under any ordinance of the city," etc. The jurisdiction of the police judge is, by said charter provision, made exclusive over all cases arising under the ordinance of the city. The offense charged arises under an ordinance of the city, and was, therefore, within his jurisdiction, so that this contention of defendants cannot be sustained.

III. The defendants' further contention is that the finding of facts by the judge of the criminal court did not warrant the judgments. We are not aware of any statute making the provisions of section 2155, Revised Statutes, applicable to the said criminal court.

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The finding of facts is not embraced in the judgment, nor can we regard such finding as part of the record proper in the case. We have only to deal with the judgment which is regular upon its face. The defendant, Carrie Neal, is not appealing, and if she were we could not review the finding of the criminal court in the absence of the evidence. Every presumption must be indulged in favor of the correctness of the finding and judgment of the court.

IV. The defendant finally contends that the judgment against him is contrary to law. It is a sufficient answer to this to state that section 17, article 4, of the charter expressly provides that "appeals in cases tried before the police judge shall be taken up and granted in the same manner as appeals from justices of the peace in civil cases, and section 1, of article 17, provides that all the ordinances in force at the adoption of this charter take effect, and shall remain in force, until repealed, etc. Section 904, chapter 43, revised ordinances of 1888, provides that appeals shall be granted upon giving like bond and affidavit, and within the same time as required on appeals from justices of the peace in civil cases. The provision of the statute, in relation to the appeals from justices of the peace, were thus adopted and became a part of the by-laws of the city. *City of Kansas v. O'Connor*, 36 Mo. App. 594.

Turning to sections 6328 and 6329, Revised Statutes, it will be seen the recognizance and the judgment thereon were proper. No notice was required by the statute to be given defendant before the rendition of the judgment. The charge of which the defendant, Carrie Neal, was found guilty was the infraction of an ordinance of the city. The action while penal was not criminal. It was in its nature a civil action to recover a penalty, and the mode and manner of taking an

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appeal, in such cases, is by the terms and provisions of the charter and ordinance of the city prescribed by the statutes just referred to. *City v. Clark*, 68 Mo. 588; *City v. Knox*, 74 Mo. 79. The law relating to the enforcement of recognizances in criminal cases has no sort of application to a case like this.

It results that the judgment of the criminal court will be affirmed. All concur.

CHARLES E. COOKE *et al.*, Appellants, v. THOMAS McNEIL *et al.*, Respondents.

Kansas City Court of Appeals, April 4, 1892.

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1. **Mechanics' Lien:** FIXTURES: FURNACE: INSTRUCTION. In an action to enforce a mechanics' lien for furnishing a hot-air furnace for a dwelling, an instruction telling the jury that, if the furnace rested on the ground, or a platform made for that purpose, and was not permanently fastened down, and that the whole apparatus was so constructed as to be removed without defacing or injuring the walls, then there was no lien is erroneous, since it omits the question of intention, which is a legal criterion, and mere physical annexation is not a test.

2. ———: STATUTE: FURNACE: CONTRACT. Under the terms of the mechanics' lien statute, the contractor is entitled to a lien for putting a furnace in a dwelling house, even though the contract provides for a removal in case the furnace does not fill the requirements.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

REVERSED AND REMANDED (*with directions*).

Cook & Gossett, for appellants.

(1) The furnaces, with their connections, attachments and pipes, constituted the furnace systems of the houses. The houses were constructed and designed for such systems of heating, and the same constituted a part

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of the houses. They constituted fixtures as fully as doors, transoms, keys or shutters, and plaintiffs were, consequently, entitled to a lien therefor. *Goodin v. Ass'n*, 5 Mo. App. 298; *Ward v. Kilpatrick*, 85 N. Y. 413; *Stockwell v. Campbell*, 39 Conn. 362; *Dimmick v. Cooke*, 115 Pa. St. 573; *Heidlinger v. Milling Co.*, 16 Mo. App. 327. (2) The provision in the contract that certain of the pipes and registers should be so attached that they could be removed without defacing the plastering or ceiling, and that appellants should have the option in a certain contingency of removing them, does not prevent them from being fixtures. For the very reason that they are fixtures the provision was put in the contract. If personalty, the right of removal would exist without such provision, in case the owner of the land refused to accept them.

Kagy & Bremerman, for respondents.

(1) What constitutes a fixture, within the meaning of the mechanics' lien law, is the pertinent inquiry. These furnaces are not fixtures. To constitute them fixtures, they must be attached to, and form part of, the realty. *Grove v. Price*, 53 Mo. 423; *Rogers v. Crow*, 40 Mo. 91; *Haeussler v. Glass Co.*, 52 Mo. 432; *Collins v. Mott*, 45 Mo. 101; *Elliot v. Wright*, 30 Mo. App. 217; *Baldwin v. Merrick*, 1 Mo. App. 281; *Goodwin v. E. H. Ass'n*, 5 Mo. App. 289; Phillips on Mechanics' Liens, sec. 175; *Towne v. Fiske*, 127 Mass. 125. (2) These furnaces were put in with a view to their removal. This was the contract and the intention of the parties. It is the intention that governs in determining what is a fixture. *Vail v. Weaver*, 132 Pa. St. 363; *Donnewald v. Real-Estate Co.*, 44 Mo. App. 352; Ewell on Fixtures, 22; *McDonald v. Shepherd*, 25 Kan. 112; *Morris v. French*, 106 Mass. 326; *Binkley v. Forkner*, 117 Ind. 176; exhaustive note 3 L. R. A. 34.

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Ellison, J.—This action is to enforce a mechanics' lien on account of a hot-air furnace, including pipes, registers, etc., furnished by plaintiff to defendant McNeil, for his residence in Kansas City. The furnace was placed in the cellar of the house and rested on a platform of brick, built for that purpose. It was not attached to this platform by fastening, nor in any other way than by its own weight. It was connected with the building by pipes leading to registers in the different rooms of the house. The contract provided that in case the furnace did not work and could not, on notice, be made to work satisfactorily, in accordance with the terms of the contract, it should be removed. It was further provided in the contract that the furnace and pipes should be so put in the building that it could be "removed without disturbing plastering or defacing ceiling."

The jury found for plaintiff on the issue of the sufficiency of the furnace, for the amount of his claim, but found that he had no mechanics' lien therefor. Plaintiff appealed in due course to this court. The appeal is well grounded. From what is clearly shown by the testimony, it is not easy to understand why plaintiffs should be denied their lien. The jury evidently found against the lien in response to the following instruction given in behalf of defendants, viz.: "If the jury believe from the evidence that the two furnaces mentioned in the contract read in the evidence were placed in the cellars of defendants' houses, rested on the ground, or on a platform of brick or stone made for that purpose, were not permanently fastened down, the heating apparatus encased in galvanized iron covering, and that the pipes used to conduct hot air and attached thereto and all parts of said attachments to said furnace were so constructed that they might be

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removed without defacing or injuring the walls, plastering or ceiling] of said houses, then plaintiffs are not entitled to lien on said houses, notwithstanding you may believe said furnaces were of value to defendants, and have not been paid for.'' This instruction cannot be defended. It prescribes tests as to whether the furnace and its attachments were fixtures or a part of the building, which are not justified by the law. It omits altogether one prominent test in such case—the question of intention. One of three requisites, as stated in the books, is: "The intention of the party making the annexing to make the article a permanent annexation to the freehold.'' *Rogers v. Crow*, 40 Mo. 91; *Donnewald v. Turner*, 44 Mo. App. 352; *Binkley v. Forkner*, 117 Ind. 176. In *Vail v. Weaver*, 132 Pa. St., the question was whether the machinery and fixtures of an electric plant which were placed in tack works were placed there permanently. The court held that if they were temporary fixtures placed for temporary purposes they were not a part of the realty; that the intention to annex is the legal criterion, and that mere physical annexation was not a test.

But if we turn to the statute giving these liens it appears quite certain that plaintiff is entitled to his lien. It is provided in section 6705, Revised Statutes, 1889: "Every mechanic or other person who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection or improvement upon land,'' etc., shall have a lien upon such building, erection or improvement. Under the lien statute of Pennsylvania similar in this respect to ours, a case arose over articles consisting of a "heating, laundry and cooking apparatus, including a large stock of soup kettles,'' which were placed in a hotel. The court held that a lien could be maintained against the building for

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these articles as being for "the erection or construction" of the building itself. And that, "When a man constructs a building for a hotel, everything of a permanent character, which will pass as a part of the freehold, and which is reasonably necessary to equip it for the purpose for which it is erected, is a part of such building." *Dimmick v. Cooke*, 115 Pa. St. 573. In *Ward v. Kilpatrick*, 85 N. Y. 413, a lien was sustained for mirror frames set in places left in the walls for that purpose in the hall and parlor of a residence,—those in the hall were so arranged as to serve the purpose of a hat rack and umbrella stand, they being *designed by the owner* to be permanently attached and to *go with the building when sold*. A case much like the one at bar is reported in 39 Conn. 362 (*Stockwell v. Campbell*), in which a mechanics' lien was upheld for a hot-air furnace placed in the cellar of a dwelling-house in a pit prepared for it in the bottom of the cellar where it was held in place simply by its own weight. The furnace was declared to be a part of the realty. We see no just ground for defeating plaintiffs' lien, as contemplated by the foregoing instruction, merely for the reason that the furnace, pipes and registers could be removed without defacing the walls or ceiling of the building.

It seems from defendants' argument that he relies to a great extent (notwithstanding the instructions omit such consideration) upon the intention of the parties to remove the furnace as shown by the contract. The contract does not show this. It merely provides for removal in case the furnace does not fill the requirements. The same provision might be made to any other part of a house. But that the furnace, if good, as found by the jury, was to be a permanent attachment and part of the freehold, can scarcely be questioned from defendants' own testimony, and the fact it

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could be removed without injuring or defacing the house, the foregoing authorities show, should have no weight in destroying a case otherwise well made. The judgment is reversed and cause remanded with directions to enter a judgment enforcing plaintiffs' lien. All concur.

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GUS. O. L. SAUER, Respondent, v. GUS. L. BEHR, Appellant.

Kansas City Court of Appeals, April 4, 1892.

1. **Fraudulent Conveyances:** MORTGAGE OF STOCK OF GOODS: ATTACHMENT. The mortgage of a stock of goods where the mortgagor continues with the consent of the mortgagee in his usual course of business, selling the same, is fraudulent in law and furnishes ground for attachment, nor does it matter if it was made to secure a *bona fide* debt.

2. ———: RECORD: CREDIT OF MORTGAGORS. The withholding of a chattel mortgage on stock of goods from record so as to place the credit and solvency of the mortgagor on a false basis and aid him in imposing on his creditors, is fraudulent.

3. ———: ATTACHMENT: PARTICIPATION OF MORTGAGEE. On the trial of the plea in abatement to an attachment, the participation or non-participation of the mortgagee in the alleged fraudulent mortgage, is immaterial, as the matter in issue is the fraud or good faith of the attached debtor in the transaction.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

AFFIRMED.

Hayward & Griffin, for appellant.

(1) The court should have sustained defendant's demurrer to the evidence. *Dobyns v. Meyer*, 95 Mo. 132; *Furniture Co. v. Fricke*, 39 Mo. App. 146; *Robinson's Ex'rs v. Robards*, 15 Mo. 459; *Brooks v. Wimer*,

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20 Mo. 503; *Reed v. Pelletier*, 28 Mo. 173; *Thompson v. Foerstel*, 10 Mo. App. 290; *Hopkins v. Hastings*, 21 Mo. App. 263; *State v. County Court*, 51 Mo. 350; *State v. County Court*, 51 Mo. 395; *Eaton's Adm'r v. Perry*, 29 Mo. 96. (2) Each of the instructions of the court, whether given on its own or plaintiff's motion, contains reversible error.

J. W. Gillespie, for respondent.

(1) There was ample proof on the trial to support the verdict of the jury. The mortgages offered in evidence were assailed and are assailable on two grounds, because they were to the use of the grantor. *Brook v. Wimer*, 20 Mo. 503; *Reed v. Pelletier*, 28 Mo. 173; *State to use v. Tasker*, 31 Mo. 445; *State to use v. D'Oench*, 31 Mo. 453; *Lodge v. Samuels*, 50 Mo. 204; *Bullene v. Barrett*, 87 Mo. 185; *Hisey v. Goodwin*, 90 Mo. 366. (2) The mortgages assailed in this case were withheld from the record at the request of, and by agreement with, the defendant (mortgagor), for the avowed purpose of obtaining credit on a false basis. Good faith and justice require that a chattel mortgage be put on record in a reasonable time. *Wilson v. Milligan*, 75 Mo. 41; *Walsh v. Chambers*, 13 Mo. App. 301.

Gill, J.—During the years 1888 and 1889, defendant Behr was engaged in the saloon and restaurant business at Ninth and Broadway streets, Kansas City. While so engaged, defendant became indebted to various parties, and among them to this plaintiff. On the twenty-third day of May, 1889, plaintiff brought suit by attachment against defendant, alleging in the affidavit, among other causes, that the defendant had fraudulently conveyed or assigned his property and effects so as to hinder and delay his creditors. Plea in

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abatement was filed, putting in issue the grounds of attachment; a trial was had thereon, resulting in a finding and judgment sustaining the attachment, and defendant appeals.

I. The main objection here urged by defendant's counsel seems to be that the testimony did not justify the verdict, and, hence, that the trial court erred in refusing to sustain a demurrer to the evidence. As to this we have carefully read the record, and considered the printed brief and argument of defendant's learned counsel, but fail to see any reason for disturbing the judgment. The evidence not only sustains the verdict and judgment below, but it is difficult to see how any other result could have been reached.

It satisfactorily, if not conclusively, appears that several months prior to the levy of this and other attachments defendant Behr executed two separate mortgages covering his entire stock of goods, restaurant and saloon fixtures, and, with the full knowledge and consent of the mortgagees, he was permitted to continue in possession and to sell and dispose of such goods in the usual course of the defendant's business. That such conveyances were fraudulent in law and furnish grounds for attachment, is no longer an open question in this state. *Reed v. Pelletier*, 28 Mo. 177; *State to use v. Tasker*, 31 Mo. 445; *Lodge v. Samuels*, 50 Mo. 204; *Bullene v. Barrett*, 87 Mo. 189; *Hisey v. Goodwin*, 90 Mo. 366; *Douglass v. Cissna*, 17 Mo. App. 44; *Farmers & Merchants' Bank v. Price*, 41 Mo. App. 291.

Under the uniform ruling in the courts of this state such mortgages are considered conveyances to the use of the grantor, and, therefore, fraudulent and void as to the creditors, existing and subsequent, and purchasers. Neither does it matter (as seems to be the contention of defendant's counsel) whether such mortgages

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are made to secure a *bona fide* debt, or are unsupported by any just claim.

More than this, the manner in which these mortgages were taken and held by the defendant's mortgagees stamps each transaction as one of fraud in fact, so far at least as this defendant is concerned. For example, the first mortgage was made in January, 1888, and, by a common understanding between defendant and the mortgagee, the instrument was withheld from record until May, 1889, when (owing doubtless to the move of other creditors) the mortgage was filed for record. Defendant requested such conveyances be kept from the record for the obvious purpose of securing a financial standing to which he was not entitled; and the mortgages were placed on record in May, 1889, at defendant's request. This secret performance was clearly calculated to place the credit and solvency of defendant on a false basis, and to aid him, as it did, in imposing on this plaintiff and other creditors who gave defendant credit on the assumption that this property was unincumbered.

The suggestion made at the oral argument by defendant's counsel that before such conveyances could be stamped as fraudulent as to this defendant, it must also appear that the mortgagees *participated* in the defendant's fraudulent purpose, avails nothing in this matter of attachment against the defendant. Such doctrine can only be invoked in a suit to reclaim the property from the mortgagees. In this attachment proceeding the matter at issue is the fraud or good faith of the attached debtor. If he was guilty of the execution of fraudulent conveyances so as to hinder or delay his creditors, then attachment will lie under the seventh clause of section 321, of the attachment law, whether those to whom the property was conveyed were actuated

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by good or bad motives, or whether or not they knew of, or participated in, the debtor's fraud.

The judgment in this case was clearly for the right party, and will be affirmed. All concur.

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THE JOHNSON-FRAZIER LUMBER COMPANY, Respondent, v. SCHULER & MUENCH, Defendants; CHRISTIAN HELLER, Appellant.

Kansas City Court of Appeals, April 4, 1892.

1. **Mechanics' Liens:** JUSTICES' COURTS: PARTIES. Section 6713, Revised Statutes, 1889, requires that in all suits for the enforcement of mechanics' liens the parties to the contract shall be made a party, and the statute further provides that in all cases where a lien shall be filed by any person other than the contractor it shall be the duty of the contractor to defend any action brought thereon; and in actions in a justice's court for the enforcement of such a lien no judgment can be rendered unless the contractor is made a party.

2. ———: ESSENTIALS TO JUDGMENT OF ENFORCEMENT. No recovery can be had charging the premises with a mechanics' lien except as incident to a personal judgment against some one with whom the contract for the work or materials was made who himself is either the owner or standing with the owner or some contractor under him in a contractual relation, and then only where the work or material actually entered into the construction of the building or improvement.

3. ———: PARTIES: WAIVER: JUSTICES' COURTS. In a justice's court the owner does not waive the defense of parties in an action to enforce a mechanics' lien, by failing to move to have the contractors made parties.

Appeal from the Buchanan Circuit Court.—HON. A. M. WOODSON, Judge.

REVERSED AND REMANDED (*with directions*).

Benj. Phillips, for appellant.

(1) The transcript of the justice's docket shows that the notice to Schuler & Muench by publication was

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fatally defective, and that the judgment against appellant is absolutely void. R. S. 1889, sec. 6163; *McKelvey v. Wonderly*, 26 Mo. App. 631; *Railroad v. Campbell*, 62 Mo. 588; *Bobb v. Woodward*, 42 Mo. 482. (2) It is well settled that the jurisdiction of inferior courts must affirmatively appear upon the face of their proceedings, or their acts are void, and no presumption will be indulged in support of such jurisdiction. *Ewing v. Donnelly*, 20 Mo. App. 6; *Sanderson v. Fleming*, 37 Mo. App. 595; *Fisher v. Davis*, 27 Mo. App. 321, and cases cited; *Haggard v. Railroad*, 63 Mo. 302; *Cunningham v. Railroad*, 61 Mo. 33; *Fletcher v. Keyte*, 66 Mo. 285; *McQuoid v. Lamb*, 19 Mo. App. 153. (3) In this case the transcript of the justice fails to show affirmatively that defendants, Schuler & Muench, had been served with process, but it does, however, recite the jurisdictional facts, and the facts recited are not sufficient to confer jurisdiction upon the justice to render a valid judgment against appellant. *McKelvey v. Wonderly*, *supra;* R. S. 1889, sec. 6163. (4) If the record recite the jurisdictional facts, and the facts recited are not sufficient to confer jurisdiction, there can be no presumption that the recital is incorrect or incomplete, even where the record is one of a superior court of general jurisdiction. *Hann v. Kelly*, 34 Cal. 391; *Dillard v. Iron Co.*, 82 Va. 734; Black on Judgments, sec. 277, and cases cited in note 182.

Spencer & Strop and *A. B. Duncan*, for respondents.

(1) The court had full jurisdiction over appellant by service of personal summons, and had general jurisdiction of the subject-matter of mechanics' lien actions. R. S. 1889, ch. 94, art. 4. (2) The objection of defect of parties defendant in mechanics' lien action must be raised by demurrer or answer, and the party defendant

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going to trial waives the objection, as expressly decided in *Horstkotte v. Menier*, 50 Mo. 158, and *Fruin v. Furniture Co.*, 20 Mo. App. 314. (3) The defendants and appellant going to trial without objection induced the court to commit error, if error was committed, and in such case the appellate court will disregard any objection on account of said supposed error. *State v. Stewart*, 90 Mo. 507; *Fairbanks v. Long*, 91 Mo. 628; *Harrington v. Sedalia*, 98 Mo. 583. (4) There is no error in this case, because the court had jurisdiction of appellant and of the subject-matter of this suit, and upon constructive service upon non-resident defendants the court was not authorized and could not render personal judgment against them, but only a special judgment against the property, all of which was done. R. S. 1889, secs. 6164, 6117. (5) Even though the record failed to show service upon absent defendants (which it does not), it would simply cause the case to be remanded, because the fact of service and manner of the same can be inquired into by the trial court by evidence *aliunde*, under the authority of *Cunningham v. Railroad*, 61 Mo. 33, and also *Seeley v. Taylor*, 28 Pac. Rep. (Col.) 461, the pretext in this case being not that the proper service was not made, but that the judgment of the justice fails to show the same.

Benj. Phillips, for appellant in reply.

(1) The objection to defect of parties in an action to enforce a mechanics' lien need not be raised by answer or demurrer where, as in this case, the parties not proceeded against, or not properly brought before the court, are necessary parties to the rendition of any judgment. *Steinmann v. Strimple*, 29 Mo. App. 478. And Schuler & Muench, neither of whom were brought before the court, were necessary parties to the rendition of any judgment herein. *Steinmann v. Strimple*, 29

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Mo. App. 478; *Downey v. Higgs*, 41 Mo. App. 215; R. S. 1889, sec. 6173. The cases cited by respondents, *Horstkotte v. Menier*, 50 Mo. 158, and *Fruin v. Furniture Co.*, 20 Mo. App. 313, are not like this case, and are not in point. (2) And, though mere irregularity preceding the rendition of the judgment would not warrant a motion to quash the final process issued thereon, want of jurisdiction will, and the court had no jurisdiction in this case to render a judgment against appellant. *Holzhour v. Meer*, 59 Mo. 434; *Ewing v. Donnelly*, 20 Mo. App. 6; *McKelvey v. Wonderly*, 26 Mo. App. 631.

SMITH, P. J.—Plaintiff corporation, a lumber company, sold and delivered a bill of lumber amounting to $70.95, to the defendants, Schuler & Muench, contractors, with the other defendants, the Hellers, for the erection of a certain building for the latter. The plaintiff, in accordance with the statute, filed its mechanics' lien against the lot and the building, in the erection of which said lumber was used by Schuler & Muench, under the contract with the owners, the Hellers. Afterwards the plaintiff brought its suit for the enforcement of said lien before a justice of the peace. The defendants, the Hellers, were duly served with process, but no service was had on Schuler & Muench. The justice thereupon entered an order on his docket requiring the plaintiff to give notice to Schuler & Muench as required by section 6163, Revised Statutes.

On the day set for the hearing of the cause the following entry appears on the docket of the justice: "And now, on this first day of December, 1890, it appearing to the satisfaction of the court, that Newton Hall, constable of Washington township, did, more than twenty days before the time of the trial in this case, post up, at four public places in the county, four

public notices directed to William H. Schuler and James Muench, parties defendant herein, notifying them of the day, date, time and place of trial in this case, as required by law, which said fact was admitted by the defendants' counsel, although the said constable failed to make proper return of said notices as provided by law; now on this first day of December, 1890, this cause being submitted to the court without a jury, and the court having heard and considered the evidence, as well as the arguments of counsel, finds that plaintiff's lien is not sustained by the evidence, and that defendants are entitled to recover of, and from, the said plaintiff their costs herein expended, taxed at $12.60. It is, therefore, adjudged that the said defendants have judgment against the said Johnson & Frazier Lumber Company, the plaintiff as aforesaid, for their costs herein expended, taxed at $12.60, and have therefor execution." From this judgment the plaintiff appealed to circuit court where on a new trial it was adjudged that the plaintiff recover of the defendants the amount of the lien account, and that the same be delared a lien against said real estate, and have thereof execution. Afterwards the defendants Heller filed a motion to set aside said judgment and to quash the special execution issued thereon upon the specific ground that said judgment was void.

From the judgment overruling the motion, defendants, the Hellers, have appealed.

The justice, under the provisions of article 4, chapter 94, was invested with jurisdiction over the subject-matter of the action. The appealing defendants, the Hellers, who were the owners of the property subject to the lien of plaintiff, were served with summons according to law so that the jurisdiction, not only over the subject-matter but of the person as to the appealing defendants, was complete. But the appealing defendants

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contend that it appears from the transcript of the justice contained in the bill of exceptions, that Schuler & Muench, the contractors, were not notified by publication according to law, and that, therefore, there was such a defect of jurisdiction of the justice over all the necessary parties to the suit as that no valid judgment could be rendered against them, the appealing defendants. Jurisdiction over the subject-matter of an action cannot be conferred by consent. The law alone, and not the consent of the parties, must determine what matters a court may adjudicate. Jurisdiction, however, over the person may be waived. The order of publication by the justice in this case was well enough, but the advertisement of it was deficient in several essential particulars, as will be seen by reference to it in connection with section 6163, Revised Statutes, and 26 Mo. App. 631. The transcript of the justice's docket shows that at the trial "defendants' counsel" admitted that Schuler & Muench had been notified "as required by law." It further appears by such transcript, that the justice, after hearing the evidence "as well as the arguments of counsel, finds the plaintiff's lien is not sustained," and gave judgment for the defendants. If this were all we should be inclined to the opinion that the defendants, Schuler & Muench, were present by their counsel and participated in the trial. But it further appears from the bill of exceptions that it was agreed at the hearing of the motion to quash, that Schuler & Muench had not appeared either before the justice or in the circuit court, in person or by attorney, so that interpreting the recitals in the justice's judgment in the light of this agreement, we must conclude that the counsel there referred to was that of the appealing defendants, and that the admission made by him was that the publication had been made as there recited—not that it was such a publication as is required

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by the statute. The admission so construed shows neither the appearance of Schuler & Muench nor that the publication was made according to law. It must follow from these considerations that Schuler & Muench were neither notified nor voluntarily appeared in any way to the action.

The statute, section 6713, requires that, in all suits for the enforcement of mechanics' liens, the parties to the contract shall be made a party. It further provides in section 6725, that in all cases where a lien shall be filed by any person other than the contractor, that it shall be the duty of the contractor to defend any action brought thereupon, etc. In *Horstkotte v. Menier*, 50 Mo. 158, it was declared that when the owner of property contracts with a responsible party to furnish all materials and erect for him a building under the above section, he has the right to look to such contractor for protection against all liens by materialmen and subcontractors. If the original party was not made a party he would not be bound by the judgment; whereas, if he was, he would be estopped to dispute the amount of the recovery between himself and the owner. The original contractor ought to be brought before the court as a codefendant for the purpose of protecting his rights and those of the owner. The statute in relation to the enforcement of mechanics' liens before justices of the peace requires that, if the finding be for the plaintiff and sustaining the lien, the judgment shall be that he recover the amount of the indebtedness found to be due, with costs, with the addition that, if sufficient property of the debtor cannot be found to satisfy such judgment and costs, the same or the residue thereof shall be levied of the property charged with the lien, etc. The case under the statute is as if a creditor proceeding by attachment and garnishment should dismiss his suit against the defendant and afterwards take steps

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against the garnishee when there could be no judgment which he could satisfy. *Webbing v. Powers*, 25 Mo. 599; *Ashburn v. Ayers*, 23 Mo. 77; *Westcott v. Budwell*, 40 Mo. 146; *Steinmann v. Strimple*, 29 Mo. App. 478; *Steinkamper v. McManus*, 26 Mo. App. 52; *Murdock v. Hillyer*, 45 Mo. App. 287.

In all cases except in that provided in section 6164 the statute by its very terms requires that there must be a personal judgment against the contractor; otherwise there would be no judgment which the owner's property could be condemned to satisfy. It is well settled by the cases just cited that no recovery can be had charging the premises with a lien except as incident to a personal judgment against some one with whom the contract for the work or materials was made, and who, himself, is either the owner or standing with the owner, or some contractor under him, in a contractual relation, and then only where the work or material actually entered into the construction of the building or improvement. The judgment of the circuit court was rendered as if the contractors had been notified as required by section 6163, which, as we have seen, was not the case.

It is contended by the plaintiff that, although the appealing defendants had the right to have the contractors, Schuler & Muench, made codefendants and served with process, yet, as that was not done, and as they took no steps before judgment to have it done, that they thereby waived their right. It has been oftentimes decided under our practice act that unless the objection of defect of parties to the record is made, either by demurrer or answer, it will be deemed waived. *Gimbel v. Pignero*, 62 Mo. 240; *Butler v. Lawson*, 72 Mo. 227. And this rule has been held to apply in actions brought upon mechanics' liens in courts of

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record. *Horstkotte v. Menier*, 50 Mo. 158; *Fruin v. Furniture Co.*, 20 Mo. App. 313. But the statute, section 2047, upon which the foregoing rule of practice is based, is limited to actions in courts of record, section 2038, and, hence, is inapplicable to actions brought before justices of the peace. If the contractors had been personally served with process, the plaintiff would be entitled to judgment as provided in section 6162, Revised Statutes, or if there had been constructive notice to them then it would be entitled to judgment as provided in section 6164; but, as there was neither kind of service, there can be no judgment at all. Proceeding under the rule, "When jurisdiction is conferred upon a tribunal, to be exercised in a special mode, contrary to the course of the common law, the steps prescribed by the statute, as preliminary to the exercises of the jurisdiction, must be substantially complied with, in order that the jurisdiction may attach. The rule is even of greater force where the proceeding takes place in an inferior tribunal, not of record, such as the court of a justice of the peace." And the further rule that, in order for a court to acquire jurisdiction by an order of publication to render a valid judgment against a party who does not appear, the statutes prescribing the substance of the notice, which it is apparent was not done in this case, must in all respects be substantially complied with (*McKelvey v. Wonderly*, 26 Mo. App. 631; *Railroad v. Campbell*, 62 Mo. 588; *Bobb v. Woodward*, 42 Mo. 482), we must conclude that there was no jurisdiction to render the judgment in question, and that it is, therefore, void.

The judgment of the circuit court is reversed, and cause remanded with directions to sustain the motion of the appealing defendants. All concur.

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THE SMITH-FRAZIER BOOT & SHOE COMPANY, Appellant, v. THE WESTERN UNION TELEGRAPH COMPANY, Respondent.

Kansas City Court of Appeals, April 4, 1892.

Telegrams: DAMAGES FOR DELAYED DELIVERY: LIMIT OF PRESENTATION 49 99
OF CLAIM FOR. Agreements limiting the time for presenting claims 56 196
for damages for the delayed delivery of a telegram are universally upheld, where the time limited is reasonable, and sixty days from date of sending is a reasonable time; and the evidence in this case is *held* to show that plaintiff did, within the sixty days limited, learn of the delayed delivery and consequent damages, or could have done so by the use of ordinary diligence.

Appeal from the Buchanan Circuit Court.—HON. HENRY M. RAMEY, Judge.

AFFIRMED.

Reed, James & Randolph, for appellant.

(1) Appellant was damaged by respondent's gross negligence in not delivering the message from appellant to its attorney, M. M. Fuller, October 31, 1887, to the amount of the value of the property left after satisfying the first five attachments and costs therein. *Bliss v. Tel. Co.*, 30 Mo. App. 103; *Hadley v. Baxendale*, 9 Exch. 341; 3 Sutherland on Damages [1882 Ed.] p. 298, bot. pp. 305, 306; *Griffin v. Colver*, 16 N. Y. 489; *Abeles v. Tel. Co.*, 37 Mo. App. 554. (2) Appellant did not know of the non-delivery of the message, or of its claim for damages, until more than sixty days after the sending of the message, and, therefore, could not make a claim to respondent for damages within that

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time. (3) The "term" or condition printed on the telegraph blank on which the appellant sent the telegram to its attorney, requiring claim for damages to be made in sixty days from the sending of the message, was under the facts in this case impossible, unreasonable and unjust, and, therefore, contrary to public policy, and void. *Massengale v. Tel. Co.*, 17 Mo. App. 257, 260–61; *Heinman v. Tel. Co.*, 57 Wis. 562; 16 N. W. Rep. 32; Thompson on Law of Electricity, sec. 255. (4) The printed term or condition on the telegram, requiring the message to be repeated, does not affect this case, as the damage resulted, not from error in transmitting the message, but from gross negligence, against which telegraph companies, like common carriers, cannot limit their liability. *Wann v. Tel. Co.*, 37 Mo. 482; *Becker v. Tel. Co.*, 7 N. W. Rep. (Neb.) 868, which cites: *Redpath v. Tel. Co.*, 112 Mass. 71; *Grinnell v. Tel. Co.*, 113 Mass. 299; *Potts v. Railroad*, 17 Mo. App. 394, 401, 402, citing *Railroad v. Strain*, 81 Ill. 504; *Railroad v. Pratt*, 89 U. S. 831; *Abraham v. Tel. Co.*, 23 Fed. Rep. 315, 317, citing *Express Co. v. Caldwell*, 21 Wall. 269; 3 Sutherland on Damages [1882 Ed.] pp. 296, 297.

John Doniphan, for respondent.

Plaintiff proved this claim was not presented for four or five months, and fails to show it was the fault of defendant or that it was unavoidable; the only excuse is its laches in not attending to its business. Nothing but gross negligence of the agents of plaintiff could have overlooked it so long, and defendant should not suffer for that. The contract limiting the claim to sixty days is binding. *Tel. Co. v. Dougherty*, 11 Ark. 102; 15 S. W. Rep. 468; *Hill v. Tel. Co.*, 85 Ga. 30; Am. & Eng. Cor. Cases, 590; *Tel. Co. v. Culbertson*, 79 Tex. 65; S. W. Rep. 219; 5 Am. Cases, 426; 33 Minn. 229;

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Wolf v. Tel. Co., 62 Pa. 83; 45 Barb. 274; *Heinman v. Tel. Co.*, 57 Wis. 562; *Ellis v. Tel. Co.*, 13 Allen, 226; *Wann v. Tel. Co.*, 37 Mo. 472; 12 Mass. 71; *Massengale v. Tel. Co.*, 17 Mo. App. 259; *Express Co. v. Caldwell*, 21 Wall. 269; *Young v. Tel. Co.*, 69 N. Y. 165; *Tel. Co. v. Damfield*, 18 Pac. Rep. 34; *Tel. Co. v. Gantt*, 20 N. E. Rep. 222.

Gill, J.—In October, 1887, plaintiff was engaged in the wholesale boot and shoe business at St. Joseph, Missouri, and as such had a claim against one C. K. Brown, a retail dealer at the town of Ellis, in Ellis county, Kansas. On the thirty-first day of said October, the plaintiff, being informed that Brown had absconded, deposited a telegram with defendant at its office in St. Joseph, directed to Fuller, the plaintiff's attorney at Ellis, wherein he, Fuller, was instructed to attach the goods of said Brown. By other telegrams, too, plaintiff arranged for security on the attachment bond. The telegram to Fuller was transmitted to Ellis, but as to whether or not it was delivered to Fuller is a matter of dispute under the evidence. The ground of plaintiff's suit is that its telegram to Fuller was so delayed that other attaching creditors of Brown came in and secured all the assets, by reason whereof plaintiff lost its claim. Hence this action for damages. At the close of the evidence the trial judge instructed the jury that under the law and the evidence the plaintiff could not recover. Thereupon plaintiff took a nonsuit with leave, and, upon the motion to set aside the same being overruled, the plaintiff has appealed to this court.

The principal matter of contention in this case grows out of the facts as applied to the following stipulation appearing on the face of the message blank, whereon plaintiff wrote the Fuller telegram. It reads: "The company will not be liable for damages

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in any case where the claim is not presented in writing within sixty days after sending the message." Now plaintiff's telegraphic message was sent October 31, 1887, and no claim in writing was made until the filing of the petition in this cause, which was on the eighteenth day of August, 1888, nine months and eighteen days "after sending the message." In addition to other matters going to the merits, the defendant relies on this failure of the plaintiff to present its claim, within the sixty days, as a bar to the action.

Agreements limiting the time for presenting claims for damages in such cases as this are so universally upheld that discussion is no longer necessary. The same rule applies, and with equally as much reason, as in cases of common carriers or insurance companies. Principal of these reasons is, that before the matter shall have been forgotten, the facts and circumstances may be looked up and it can determine therefrom who was at fault. The courts will recognize and enforce such agreements prescribing the time in which claims for damages shall be made, provided only that such time is reasonable. In a late work on this subject it is stated as a general principle "that a stipulation in a telegraph message blank that the company will not be liable for damages unless the claim therefor is presented within a certain time after the delivery of the message to the company for transmission, is reasonable, provided the time limited is not too short to enable the sender, in the exercise of ordinary diligence, to ascertain the fact of the mistake, delay, non-delivery or other default, and the amount of damages thereby occasioned, and to present his claim therefor." Thompson on Law of Electricity, sec. 245. Without qualifying circumstances it cannot be denied that in cases such as this sixty days is ample time within which to present any claim against the company. In

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cases of like kind, thirty and even twenty days was held sufficient. See numerous cases cited in defendant's brief. It has been held, too, that even though all but a few days of the time limited may have passed before the plaintiff discovered the non-delivery of the message and consequent loss, yet if time sufficient remained in which to present the claim (so as to be within the designated period) the plaintiff would not be absolved from the duty to present his claim within such time. *Massengale v. Tel. Co.*, 17 Mo. App. 257; *Thompson v. Railroad*, 22 Mo. App. 327.

But plaintiff claims that it must be relieved of this agreement to present its claim within sixty days after sending the message, as it did not discover the defendant's failure to deliver the telegram to its agent and attorney until the said sixty days had expired. In answer to this it is proper to say that plaintiff has failed to show that the sixty days had expired when it became aware of the delay in delivering the telegram to Fuller. The evidence on this feature is very meager and unsatisfactory. The most that can be said of such testimony is that Frazier (denominated treasurer and credit man of the plaintiff) did not learn the dispatch was delayed until several months had expired. There is on the other hand evidence tending to prove that the plaintiff had notice of defendant's alleged delinquency a very short time after the message was sent—perhaps, less than the sixty days. On the face of the message contract, the limitation of sixty days had barred plaintiff's claim, since the undisputed facts show that the notice of claim was first served more than nine months after sending the message. If, then, there were circumstances which saved the plaintiff's claim from the operation of the limitation agreed on it was incumbent on the plaintiff to prove it. In this there was failure.

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But even more than this it is beyond question that quite six months before plaintiff gave defendant the first notice of his claim it was informed of defendant's alleged failure to deliver the telegram, and yet permitted the time to run without mention to defendant. If, then, the limitation began to run only from the discovery of the company's delinquency, not only sixty days, but six months had expired.

By the exercise, too, of the least diligence plaintiff would have been well informed as to the extent of his damages, even before the expiration of the sixty days following the transmission of the Fuller message. It had an attorney at Ellis, who had, or might have had, by the use of ordinary care, full knowledge of the amount of prior attachments levied on Brown's property. He saw, or could have seen, the extent of Brown's assets. He was informed by the report of the receiver in charge of the estate, as to the money realized, etc. All, too, more than four months before a written claim was served on defendant. So then viewed from whatever standpoint plaintiff, by its own *laches*, has lost any recourse it ever had, if any, against the defendant, and the circuit court properly directed a verdict for the defendant.

Judgment affirmed. All concur.

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CHARLES RICHMOND, Respondent, v. THE QUINCY, OMAHA & KANSAS CITY RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, April 4, 1892.

1. **Common Carriers:** CONTRACT WITH PASSENGER: STOPPING AT STATION. A railroad contracts with its passengers to stop its trains and remain at the station a sufficient length of time for them to leave its train in safety.

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2. ———: STOPPING AT STATION: ALIGHTING FROM MOVING TRAIN: JURY QUESTION. **Whether it is imprudent and careless for a passenger to attempt, at the station of his destination, which has been announced and the train slowed up, but not stopped, to alight from the still moving train after it has passed the depot, depends on all the circumstances and is a proper question for the jury.**

Appeal from the Sullivan Circuit Court.—HON. G. D. BURGESS, Judge.

AFFIRMED.

John P. Butler, for appellant.

(1) The law is that a passenger who jumps from a railroad train in motion merely to avoid being carried past the station at which he wants to stop, and is thereby injured, cannot recover. *Nelson v. Railroad*, 68 Mo. 593; Wharton on Negligence, secs. 378–80. And where the plaintiff's own case shows that the injury occurred by his own negligence the court should direct a nonsuit. Wharton on Negligence, sec. 427; 2 Thompson on Trials, 226; *Railroad v. Whittaker*, 35 Oh. St. 627; *Milburn v. Railroad*, 86 Mo. 109; *Buesching v. Gaslight Co.*, 73 Mo. 229. (2) The court erred in instructing the jury for plaintiff. Wharton on Negligence, secs. 378–90. The conductor had given the plaintiff notice that the train would stop at that station. What right had he to disregard this notice and voluntarily leave the train while it was still in motion? (3) The court erred in refusing to instruct the jury as requested by defendant. If, on the plaintiff's evidence, it clearly appears that he was guilty of carelessness or negligence which contributed directly to produce the injury he complains of, he cannot recover, and the court should so instruct the jury. *Nolan v. Shickle*, 69 Mo. 340; *Harlan v. Railroad*, 64 Mo. 480; *Fletcher v. Railroad*, 64 Mo. 484; *Schaabs v. Woodburn, etc., Co.*, 56 Mo. 175; *Barton v. Railroad*, 52 Mo. 253.

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(4) There is no evidence to sustain the verdict. See authorities cited *supra*, and particularly *Nelson v. Railroad*, 68 Mo. 593, which is decisive of the case in point.

A. W. Mullins and *W. F. Calfee*, for respondent.

It was a question for the jury to determine whether or not, under the attending circumstances, the plaintiff was guilty of negligence in alighting from the train. *McGee v. Railroad*, 92 Mo. 208; *Railroad v. Horst*, 39 U. S. 291; *Leslie v. Railroad*, 88 Mo. 50; *Doss v. Railroad*, 59 Mo. 27; *Kelley v. Railroad*, 70 Mo. 604; *Filer v. Railroad*, 49 N. Y. 47; *Wyatt v. Railroad*, 55 Mo. 485.

SMITH, P. J.—This was an action to recover damages for personal injuries. It appears that the plaintiff took passage from Humphreys to Reger, a station eight miles east. After the train had whistled for Reger station the conductor went back through the caboose and announced in the usual way, "Reger!" The plaintiff got up off his seat and went back out onto the rear platform of the caboose, and the conductor went the other way toward the front and began to set the brakes for the purpose of stopping the train. After the caboose had passed the depot some fifty yards, and while the train was still slowly moving, the plaintiff stepped or jumped off, and sustained the alleged injuries of which he complains. After the plaintiff jumped off, the train ran some little distance further and stopped. The night was dark, and there were no lights at the station. There was a trial and judgment for plaintiff, from which defendant appealed.

The plaintiff had purchased a ticket for Reger station. The defendant thereby impliedly obligated itself to stop its train and remain at the station a sufficient length of time for the plaintiff to leave its train in safety. 2 Redfield on Railroads, 280; 2 Wood on

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Railroads, sec. 305; *Daugherty v. Railroad*, 86 Ill. 467; Wharton on Negligence, sec. 3722. It is not negligence *per se* for a passenger to jump from a train which is moving. Beach on Contributory Negligence, sec. 53. Whether or not a railway company shall be liable in damages for injuries sustained by a passenger in attempting to leave one of its trains which is in motion, will depend on all the circumstances, whether it was prudent for him to make an attempt. When an injury has been received by the *reckless act* of a passenger in an attempt to leave the train when in motion, no recovery can be had although the company may have disregarded a duty imposed by law in failing to stop at a station. *Daugherty v. Railroad*, 86 Ill. 467; *Railroad v. Swift*, 22 Ind. 450; *Railroad v. Chappel*, 23 Pa. St. 147; Shearman & Redfield on Negligence, 341. So the doctrine is laid down in 2 Wood on Railways, 1148, that, "if a passenger is negligently carried beyond his stopping place, he can recover for the inconvenience, loss of time and expense of traveling back, but if he jumps or leaves the train, under circumstances which render the act imprudent, he does so at his own risk and assumes the consequences of the act." To support this statement of the rule, the author cites: *Kelley v. Railroad*, 70 Mo. 604; *Straus v. Railroad*, 75 Mo. 185; *Nelson v. Railroad*, 68 Mo. 593. So when a railway company fails to bring its train to a full stop at a station, it will be liable in damages from injuries sustained by a passenger in attempting to get off, if, under all the circumstances, it was prudent for him to do so. The question of negligence must be treated here as a mixed question of law and fact, the facts being left to the jury and the legal effect of them declared by the court.

The rule, we think, to be deduced from all of the authorities is that all the circumstances of each case

must be considered in determining whether, in that case, there was contributory negligence or want of ordinary care, and it is not sound to select one prominent and important fact, which may occur in many cases, and say that being present there must, as a matter of law, have been contributory negligence. The circumstances vary infinitely and always more or less control each other. *Karl v. Railroad*, 55 Mo. 476; *Morrissey v. Ferry Co.*, 43 Mo. 300; *Morrison v. Railroad*, 56 N. Y. 302.

Whether it was prudent under all the circumstances of this case for the plaintiff to have attempted to leave the defendant's train before it came to a full stop, was a question to be ascertained and determined from all the attendant circumstances disclosed in the evidence (*Walter v. Railroad*, 83 Mo. 608; *Doss v. Railroad*, 50 Mo. 37), such as these: The speed of the train. *Clotworthy v. Railroad*, 80 Mo. 320; *Straus v. Railroad*, 75 Mo. 185; *Surgist v. Railroad*, 75 Mo. 475; *Leslie v. Railroad*, 88 Mo. 50. The conduct of conductor, the darkness of the hour, the age and activity of the plaintiff and the like. *Price v. Railroad*, 72 Mo. 414; *Wyatt v. Railroad*, 55 Mo. 435.

This case in its facts does not resemble *Nelson's case* reported in 68 Mo. 591. There, Mrs. Nelson, who was a large fleshy old lady, against the remonstrances of the trainmen, jumped from the train while it was moving from four to fourteen miles an hour. It is therefore plain that the two cases are quite distinguishable, not only in fact but in their governing principles.

In *Filer v. Railroad*, 49 N. Y. 47, quoted with approval by Judge NAPTON in *Wyatt v. Railroad*, 55 Mo., *supra*, it was said: "That there is more hazard in leaving a car in motion, although moving slowly, than when at rest, is self-evident. But whether imprudent and careless to make the attempt, depends on circum-

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stances, and where a party, by the wrongful act of another, has been placed in circumstances calling for an election before leaving the cars, of submitting to an inconvenience and a further wrong, it is a proper question for the jury, whether it was a prudent and ordinarily careful act, or whether it was rash and reckless exposure of the person to peril and hazard." It is not meant to say that a case may not arise when all the facts are undisputed and of such a nature that the question of contributory negligence may become one of law, but this is not such a case.

It is quite true that the defendant's train, after passing its station over fifty yards, did stop. It did not stop at all at its station although the conductor had called out that station before reaching it. This was a notice that a stopping would be made there. If it was the intention of the conductor of the train not to stop at the station, but to stop at a point beyond it, then certainly it was his plain duty to have so informed the few passengers who were under his charge in the caboose. How did the plaintiff know that the train would finally stop? He had no such information. His situation is not different from what it would have been had the train not stopped at all. The train was not stopped where the defendant's contract with the plaintiff required that it should be. This was the omission of a duty which directly occasioned the plaintiff to leave the train while in motion. The plaintiff is confessedly entitled to recover unless precluded by his own imprudence; and whether guilty of such imprudence or not, was a question, as we have seen, for the consideration of the jury under appropriate instructions, and not for the court.

The constitutive facts of the plaintiff's petition were embraced in the hypothesis of his instructions. The defendant's instructions told the jury, in effect, that if

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the plaintiff saw, or might have seen, by the exercise of ordinary care, that there were no lights at the station, and, therefore, while the train was in motion and before it had been brought to a stand-still, the plaintiff recklessly leaped from it out into the darkness, he could not recover. The decisive question in the case which was, whether, under all the circumstances in evidence, the plaintiff was prudent or foolhardy, in leaving defendant's train at the time of the injury, was, in our opinion, so fairly submitted to the jury under the instructions, as to leave no just grounds for complaint.

It results that the judgment must be affirmed. All concur.

EDWARD THOMAS, Respondent, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, April 4, 1892.

1. **Practice, Appellate:** EQUITY: REVIEWING EVIDENCE: DEFERRING TO TRIAL COURT. In equity cases, the appellate court reviews the entire testimony, and, if convinced that a wrong finding was made, will set it aside and enter the proper judgment, but in cases of doubt may defer somewhat to the finding of the trial court.

2. **Equity:** SETTING ASIDE RELEASE: EVIDENCE. One seeking to set aside a release of damages for personal injuries, on the ground that his signature was fraudulently obtained,—the transaction being intended as a loan, and not a release,—has the burden of proof cast upon him; and the evidence in this case is reviewed and *held* to show that after plaintiff's injuries he went to the railway officials, and, with full knowledge, secured the compromise and gave the release without any fraud or deception practiced upon him.

Appeal from the Grundy Circuit Court.—HON. P. C. SLEIPP, Special Judge.

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REVERSED.

M. A. Lowe and *W. F. Evans*, for appellant.

(1) The first count of plaintiff's petition, being addressed to the equity side of the court, should be tried anew by this court. *Benne v. Schnecko*, 100 Mo. 250; *Dale v. Hogan*, 39 Mo. App. 646; *McElroy v. Maxwell*, 101 Mo. 294; *Hardware Co. v. Walter*, 91 Mo. 484; *State ex rel. Walker v. Hurlstone*, 92 Mo. 327. (2) In order to enable a court of equity to set aside or cancel a settlement or release alleged to have been obtained by fraud, the evidence adduced to establish the fraud should be clear and convincing, and perfectly satisfactory. The evidence upon the trial of the first count of plaintiff's petition showed that the settlement was made and the release executed without the fraud of any person, and knowingly by both parties. *Walter v. Railroad*, 16 S. W. Rep. 839; *Dallam v. Renshaw*, 26 Mo. 533, 544; *Webb v. Darby*, 94 Mo. 621; *Page v. Dixon*, 59 Mo. 43; *Chapman v. McIlwrath*, 77 Mo. 38; *Keiser v. Gammon*, 95 Mo. 218; *Jackson v. Wood*, 88 Mo. 76; *Rumbolds v. Parr*, 51 Mo. 592; *Henderson v. Henderson*, 55 Mo. 535, 555; *Jones v. Degge*, 5 S. E. Rep. 799; *Building & Loan Ass'n v. Hetzel*, 103 Pa. St. 507; *Railroad v. Shay*, 82 Pa. St. 199; *Cummins v. Hurlburt*, 92 Pa. St. 165; *Roberts v. Railroad*, 22 Atl. Rep. 174.

Harber & Knight, for respondent.

(1) That the trial on the first count of plaintiff's petition was a trial in equity does not authorize an appellate court to disregard the findings of fact made by the lower court, but, on the contrary, a reviewing tribunal will defer to the findings of the chancellor; else why the effete incumbrance of a trial judge, or the

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by-play of taking his judgment, when judgment they had none. The lower court saw the witnesses, looked into their countenances, observed their conduct on the stand, and, in fact, saw what this court can only read about. *Blair v. Railroad,* 89 Mo. 393; *Cox v. Cox,* 91 Mo. 71; *Mathias v. O'Neil,* 94 Mo. 520; *Sayer v. Devore,* 99 Mo. 437; *Hard v. Foster,* 98 Mo. 297; *Benne v. Schnecko,* 100 Mo. 250. (2) "Equity will interfere in its discretion, in order to prevent intolerable injustice and not only in cases where there has been fraud, but also in cases of surprise, mistake, the improvidential execution of an instrument without time for proper or mature reflection, or where parties contract on the basis of the existence of certain facts, and such facts do not exist," [or "where there has been mistake of such a character as shows that there was no *aggregatis mentium.*" *Blair v. Railroad,* 89 Mo. 392; 1 Story's Equity Jurisprudence [Red. Ed.] secs. 138, 142; *Williams v. Williams,* 16 Ves. 82; *Tyson v. Tyson,* 31 Md. 134; *Evans v. Llewellin,* 1 Cox, 333. (3) The very fact that the defendant procured a complete release not only for loss of time, but for all damages for the personal injury and expenses resulting from the accident, for the paltry sum of $25, is of itself, and on its face, sufficient evidence to justify the circuit court in reaching the conclusion it did reach; for such is the doctrine in *Blair v. Railroad,* 89 Mo. 393, and authorities cited in paragraph 3 of the opinion.

Gill, J.—On the fifth day of December, 1888, the plaintiff, while working in the yards of the defendant at Trenton, Missouri, was caught between a passenger coach and a transfer platform and injured. On the seventeenth of that month he went to the office of the defendant's superintendent, at Trenton, and made what purports to be a settlement with defendant

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through its superintendent, C. L. Ewing, for all damages resulting from the injury he had sustained on the said fifth day of December, 1888. The plaintiff, at the time of the settlement, executed and delivered to the defendant a release for all injuries and damages so sustained, and received from the defendant $25, the amount of money agreed upon between himself and Mr. Ewing.

On the twenty-seventh of November, 1889, the plaintiff commenced this action, asking in the first or equity count of his petition, that the court, as a court of equity, cancel and hold for naught said release, and alleging in said equity count that said release was obtained by the fraud of said Ewing, and that the same was intended only as the evidence of a loan of money made by said Ewing to the plaintiff. This equity branch of the case was followed by a count in law for damages. The equity count was first tried, the court calling to its aid a jury. There was a finding and judgment thereon in plaintiff's favor, and the court set aside and held for naught the alleged settlement. The cause then proceeded to trial on the count for damages, which resulted in a verdict and judgment for plaintiff in the sum of $395, and defendant brings the case here by appeal.

We find it necessary only to consider the ruling of the lower court on the first or equity count of the petition. In so doing we are bound by the decision or finding of facts reached by the circuit judge. It is our duty in issues of this character to review the entire testimony, and, if convinced that a wrong finding and judgment was made, a further obligation rests on us to set aside the same and enter, or cause to be entered, a proper judgment. The rule is now well settled in equity cases, that if, on an investigation, the appellate

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court shall find the evidence so evenly balanced that serious doubt arises as to where the truth is, then the appellate court will defer somewhat to the finding of the lower court; in other words, will resolve the doubt in favor of the finding and judgment below. However, as said by Judge SHERWOOD in *Benne v. Schnecko* (100 Mo. 258), it is not meant by this "that we have abdicated our supervisory control over questions of fact in equity causes; it is only meant that when there is conflict, or where the testimony is evenly balanced, and the finding of the chancellor appears to be correct, then we will so far defer to his finding as to sanction it by our affirmance; that and nothing more."

The question here is, was the trial judge justified under the evidence in setting aside and holding for naught the writing which purports to be a settlement of plaintiff's claim for damages? After a patient, careful consideration of this record we must answer this in the negative. The plaintiff was injured on the fifth day of December, 1888, whether by his own or the defendant's fault, or the extent thereof, need not here be discussed. However, it may be said, that the liability of the railway company is very questionable, nor do the injuries appear to have been of any serious character. Anyhow it seems clear that in about a week or ten days thereafter the plaintiff was seen inquiring for the defendant's superintendent at Trenton with a view of making a settlement for his alleged damages. According to the testimony of plaintiff himself he went more than once to the superintendent's office before he was able to get any proposition. Ewing, the superintendent, denied any liability and was, it seems, indifferent whether he settled with plaintiff or not. However, on December 17, just twelve days after plaintiff's alleged injuries, plaintiff sought and found Ewing at his (Ewing's) office, the settlement was agreed on, and on

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payment of $25 the following receipt or statement of settlement was made:

"For the consideration of twenty-five dollars ($25.00) received of *The Chicago, Rock Island & Pacific Railway Company*, I hereby release and discharge said company from all claims and demands against it, and especially from all liability for loss or damages to me by reason of all personal injuries to date, and especially all injuries received while working on an extra gang of the said company at Trenton, Missouri, wherein I was caught between a coach and the platform to a freight house, causing the sprain of my right arm and other injuries, which occurred on or about the fifth day of December, A. D. 1888.

"Received payment, Trenton, Mo., 188—,

"Ed Thomas, [Seal.]

"The above was read to, and signed by, the said Edward Thomas, in our presence, at Trenton, Missouri, on the seventeenth day of December, 1888.

"W. A. Randall,
"F. H. Reed."

The matter then at the institution of this suit appeared as the adjustment of a disputed claim, wherein, for an acquittance of all liability, defendant paid the plaintiff the sum of money named in the above voucher. The burden then rested on the plaintiff to prove that it was not what it appeared to be. He admitted signing the instrument and that it was read to him, but alleged his signature was fraudulently procured. The burden of this issue rested on the plaintiff. He testified that he received the $25.00 from the railroad, but that it was a mere *loan;* that the superintendent advanced the money to pay for some work he might do for them in the future, yet strange to say, he testified that the company refused to give him employment. Plaintiff's evidence as given at the trial is replete with improba-

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bilities and self-contradictions. For example: He testifies that he was totally unconscious for a period of about eight or ten weeks from the time the car struck him, or, to use his own words, that "it was about eight weeks after I got hurt until I woke up. That time is pretty near a perfect blank to me, and I have no recollection of anything that happened during the eight weeks." He says in another place, "I wasn't conscious for about nine or ten weeks, was confined at home ten weeks before I got down to Mr. Ewing's." Yet it is beyond question that he did get to Ewing's office, and made this settlement on the twelfth day after his injury. Several witnesses testify to the fact that he was out and about in less than ten days after the accident. He swore that he had not less than eight weeks of mental darkness—oblivion—and yet details how he was taken home, how he was treated and by what doctor, how often the physician came to see him, how he was nearly frozen when they carried him home, etc. This self-condemned witness furnished by his oath all the evidence on plaintiff's side of the issue. To sustain defendant, some eight unimpeached witnesses testified, and all of them contradicted the plaintiff. Ewing, the superintendent, Randall, his clerk, Reed, a young hotel clerk at Trenton, and Miss Trindle, stenographer,—all of whom were present at the superintendent's office on December 17, when the settlement was affected, gave a clear, explicit and satisfactory account of Thomas' soliciting Ewing to compromise and pay him something. Three of the four testify that the writing signed by Thomas was, before signed, read over to Thomas, and all concur that nothing was said about securing a loan, but the whole matter was that Thomas was in need, that he had lost time, etc., and he importuned Ewing to pay him something. In other words, these witnesses testify in harmony with the

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voucher signed by Thomas as well as in harmony with every undisputed fact in the case. Besides witnesses, Williams, McKeen, Davis and the attending physician, Patton, all contradict the plaintiff in several important particulars. Some of these were his nearest neighbors, and they related conversations had with Thomas after December 17, in which he admitted the settlement with the railroad company. The testimony of these witnesses, too, shows beyond manner of doubt, that there was no unconscious period following the injury on the fifth of December. The sum and substance is, that plaintiff Thomas, while working in defendant's yards at Trenton, was slightly injured by a car jamming him against the transfer platform; he was laid off for a week or ten days, then went to the railway officials and with full knowledge secured this settlement or compromise; there was no fraud or deception practiced. The claim he makes is entirely without merit—an afterthought.

The trial court ought to have adjudged the first count in favor of the defendant. We, therefore, reverse the judgment. All concur.

JOHN R. CLAPTON, Administrator, Appellant, v. C. G. TAYLOR *et al.*, Respondents.

Kansas City Court of Appeals, April 4, 1892.

1. **Municipal Corporations:** CONSTRUCTION OF ORDINANCE. The ordinance set out in the statement is *held* to mean that the street was to be excavated ten inches below grade at the sides, gradually rising to a crown of four inches below such grade at the center of the street, as a preparation for the superstructure of boulders and gravel.

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2. ———: STREET IMPROVEMENT: LOWEST BIDDER: DUTY OF COUNCIL: PRESUMPTION. In letting contracts for street improvements the duty of city authorities is not wholly ministerial, but partakes sufficiently of a judicial character, in the absence of fraud or misconduct, to render their conclusion binding; and the law in regard to the letting of such contracts does not mean absolutely that the contract shall be given to the lowest bidder without regard to fitness, and the city authorities are presumed to have done, and not to have exceeded, their duty.

3. ———: STREET GRADE: EVIDENCE. Street grades must be fixed by ordinance and where the ordinance and grade books referred to therein do not establish the grade to a reasonable certainty then it would be void and the natural surface would be taken as the true grade.

4. ———: STREET IMPROVEMENT: WHAT PROPERTY LIABLE: DEPTH OF LOT. Street improvement is charged against the property which abuts the street improved at the time the lien attaches, regardless of depth of the original lot.

5. **Definitions:** "ADJACENT." In the charter of Sedalia, "adjacent" in the section relating to street improvement has reference to the work done on the street within a certain length, which is to be levied as a tax on the abutting property.

6. **Municipal Corporations:** NOTICE OF LETTING CONTRACT. Notice of the letting of contract for public work, such as street improvement, the cost of which is to be collected from the citizen, *nolens volens*, by special assessment of his property, is a matter which affects the substantial rights of the citizen, and is a condition precedent which must be fairly complied with, whether prescribed by charter or ordinance. The notice in this case *held* sufficient, though last publication was on Sunday, and there was no publication the day of the letting.

7. ———: STREET IMPROVEMENT: OWNER'S RIGHT TO DO. The charter and ordinances of Sedalia do not require that the property-owner shall be given an opportunity to make street improvements before the city lets the same out by contract.

Appeal from the Pettis Circuit Court.—HON. RICHARD FIELD, Judge.

REVERSED AND REMANDED.

THE following is the ordinance construed in the opinion:

"Sec. 1. That Fourth street between Lamine and Osage streets be graded and macadamized according to

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the following plans and specifications: The grading to be done ten inches below grade with six inches' crowning in the center. The macadam to be constructed with a foundation layer of flint boulders, four inches thick, for a distance of twenty feet each side of the center of the street; this to be covered with clean flint gravel eleven inches deep in the center and gradually and uniformly diminishing to the sides where it shall be five inches in thickness making the whole macadam fifteen inches deep at the center and nine inches deep at the sides.

"Sec. 2. The committee on streets and alleys shall let the contract for said work to the lowest responsible bidders, and to that end shall receive sealed bids or proposals, and shall publish in one or more of the daily papers published in Sedalia a notice stating that bids will be received from persons desiring to contract for said work, and stating the time and place, where and at which said bids shall be opened, reserving the right to reject any and all bids received, whereto said notice shall be published at least five days before the time fixed for opening the same."

Geo. B. P. Jackson, for appellant.

The grade of a street in Sedalia, other than the natural surface, must be established by ordinance. Charter of Sedalia, secs. 14, 15, 17; Acts, 1875, secs. 3, 4, p. 297; Acts, 1873, sec. 17, p. 369. No such ordinance was shown in this case. The fixing of a new grade of streets must be shown by the records of the city, and testimony as to understanding and opinions of witnesses, and others, is hearsay, and was improperly admitted. *Nebraska City v. Lampkin*, 6 Neb. 27. The grade of a street is the natural or existing surface of the ground, in the absence of proper evidence showing a different grade. *Gibson v. Zimmerman*, 27 Mo.

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App. 90. (2) The court erred in admitting the evidence which was received to show that Snedaker's was not the lowest bid, and in giving defendant's instruction, numbered 2. It was neither alleged nor proven that there was any fraud, partiality or improper conduct on the part of the city council in accepting the bid, and awarding the contract, or that defendants sustained any injury in consequence thereof. Elliott on Roads & Streets, pp. 427, 428; *St. Joseph v. Anthony*, 30 Mo. 542; *Brevoort v. Detroit*, 24 Mich. 324. The city council is the proper body to determine the lowest bid, and, in the absence of improper motive or conduct, their action should be final. Elliott on Roads & Streets, 441, 442; *Tel. Co. v. Board of Commissioners*, 55 Barb. 291; Welty on Law of Assessments, p. 436; 1 Dillon on Municipal Corporations [4 Ed.] sec. 468; *People v. Gleason*, 121 N. Y. 631. (3) The tax bill is *prima facie* evidence that everything has been regularly done (*Gibson v. Zimmerman*, 27 Mo. App. 90), and it, therefore, devolved upon defendants to establish the contrary. No evidence being offered upon that subject, the court erred in finding that the rejected bid was from a responsible party. *Rutherford v. Hamilton*, 97 Mo. 543–549; *Cole v. Skrainka*, 105 Mo. 307; Elliott on Roads & Streets, 410. (4) Proceedings for street improvements are liberally construed in this state. A substantial compliance with the ordinance is all that is required. *St. Joseph v. Anthony*, 30 Mo. 442; *Sheehan v. Owen*, 82 Mo. 458; *Cole v. Skrainka*, 105 Mo. 309; *Barber v. Hunt*, 100 Mo. 22.

E. J. Smith, for respondents.

(1) The giving of declaration, numbered 4, for defendants, declaring that if the contract was not let to the lowest responsible bidder plaintiff could not recover, was not error. *State ex rel. v. Barlow*, 48 Mo.

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17; *Galbreath v. Newton*, 30 Mo. App. 380, 393-4; *May v. Detroit*, 12 Am. Law Reg. 149. See 15 American & English Encyclopedia of Law, p. 1090, and cases cited. It is seen section 2 of the ordinance in this case required the contract to be let to "the lowest responsible bidder." The court found Anderson, who bid $1.60 a foot, while the contract was led to Snedaker at $1.75 a foot, was a responsible bidder, and this is supported by the evidence. *Keane v. Cushing*, 15 Mo. App. 96; *Keane v. Claussman*, 21 Mo. App. 485; *Hewes v. Reis*, 40 Cal. 255; *In re Railroad*, 102 N. Y. 301; *Matter of Application of Lange*, 85 N. Y. 307; *Matter of Petition of Robbins*, 82 N. Y. 131; *Matter of Bank*, 75 N. Y. 388. (2) There is no doubt the declaration, numbered 6, given for defendant, declaring that a substantial compliance with the ordinance is required before a recovery can be had, is the law. Then number 9, also given for defendant, goes with this, and says if the work in front of the property of defendants is not down to grade, as required by the ordinance, defendants can deduct from the amount of the tax bills so much as it will cost to put it down, and if that is the whole amount of the tax bill plaintiff can recover nothing, and this is the law. *Creamer v. Bates*, 49 Mo. 523; *Meyer v. Wright*, 19 Mo. App. 283. Section 2 of the ordinance in evidence shows how the work was to be done as regards grade. (3) Before the work can be done and a tax levied to pay for it, the property-owner must have an opportunity to do it himself. Charter Acts of 1873, sec. 15, p. 368; Acts, 1875, p. 297; *Leach v. Cargill*, 60 Mo. 316; *Galbreath v. Newton*, 30 Mo. App. 380; *Palmyra v. Morton*, 25 Mo. 593; *Kansas City v. Hurling*, 87 Mo. 203; *Coal & Mining Co. v. Neptune*, 19 Mo. App. 438; *George v. Middaugh*, 62 Mo. 549; *Stewart v. Palmer*, 30 Am. Rep. (74 N. Y.) 289; 1 Dillon on Municipal Corporations, secs. 642-3,

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and note; *State ex rel. v. Mayor*, 4 Zab. (N. J.) 662. (4) Notice for bids is essential, and the provision requiring it is mandatory. It was not published five successive days, as required by the ordinance, and the last day was Sunday. The notice here given was not sufficient. Cases already cited; *Keane v. Cushing*, 15 Mo. App. 96; *Keane v. Claussman*, 21 Mo. App. 485; *Galbreath v. Newton*, 30 Mo. App. 380, 393–4; *Hewes v. Reis*, 40 Cal. 255; 10 American & English Encyclopedia of Law, 290–1, note 1; 102 N. Y. 301. (5) The tax bill is and must be against the whole lot, not simply against the one who owns a strip of it along the street improved, and declarations 7 and 8 ought to have been given. *Steifel v. Brown*, 24 Mo. App. 103; *St. Louis v. Provenchere*, 92 Mo. 66.

Ellison, J.—This action is on tax bills for work done in paving a street in the city of Sedalia under an ordinance of said city. The work was done and tax bills issued. The judgment below was for defendant, and plaintiff appealed.

The two questions presented by the case are whether the work was done as required by the ordinance, and whether the city council was authorized to let the contract to the plaintiff's intestate, he being a bidder, but not the lowest bidder, at the letting. The first question merely involves a construction of the ordinance. The construction placed upon it by the trial court, as near as we can gather from the record, is that the excavation preparatory for the boulders and gravel should be sixteen inches below the grade at the sides, and ten inches below at the center of the street. Our view is that the meaning of the ordinance is that the street was to be excavated ten inches below grade at the sides, gradually rising to a crown of four inches below such grade at the center of the street. The

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street is then prepared for the superstructure of boulders and gravel of the required depth. Neither theory of the meaning of the ordinance seems to keep the center of the street within the grade line; and the construction we are putting upon it would allow the surface water from the street to run over adjoining property on the sides, unless the city has a system of placing the curbing above grade, since, by our construction, if the side of the street is excavated ten inches below grade, and then four inches of boulders and five inches of gravel are put upon it, it is brought back to only one inch below grade, which would not leave sufficient depth to protect adjoining property from street surface water, unless, as before remarked, the curbing is raised above grade. But at all events we can only interpret the ordinance as we find it.

The court found that the plaintiff's intestate was not the lowest bidder; and also found that one Anderson, who was the lowest bidder was a responsible bidder. The question is, had the council the power or the discretion to let the contract to the plaintiff's intestate? If the charter or ordinance of a municipality provide that the contract shall be let to the lowest bidder, a violation of this command of the law would be against the substantial rights of the taxpayer and would render a contract void which was let to one not the lowest bidder, in any case where such rejection of the lowest bid was an exercise of an arbitrary will on the part of the city authorities, without any showing that such authorities exercised their jurisdiction in that respect, by determining that the rejected bid was not the lowest and best bid. *People ex rel. v. Gleason*, 121 N. Y. 631. In such case, the duty of the city authorities is not wholly ministerial, it partakes sufficiently of a discretionary or judicial character, in the absence of fraud or misconduct, to render their conclusion or

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decision binding. *Cleveland, etc., Co. v. Board of Fire Com.*, 55 Barb. 288; Elliott on Roads & Streets, 428, 441–2; *State ex rel. v. McGrath*, 91 Mo. 386. It ought hardly to be supposed that a law requiring municipal authorities to let a contract to the lowest bidder means absolutely that the contract shall be given to the lowest bidder without regard to his fitness, responsibility or capacity to perform the work. And generally such laws read to the lowest or best bidder, or lowest responsible bidder. In this case the ordinance required the contract to be let to the "lowest responsible bidder." It does not appear that the city authorities did not exercise their jurisdiction to determine who was the lowest responsible bidder in a proper manner. There is nothing in the case going to show fraud or to attack the *bona fide* conduct of the city officials intrusted with determining who was the lowest responsible bidder. Such matters should be made to appear, in order to overturn the contract. *People ex rel. v. Gleason, supra.* Though the presumption may be overcome, yet it is presumed that the city authorities have done their duty and have not abused their discretion. Elliott on Streets, 410, 411. It is true that Anderson, and not the plaintiff's intestate, was the lowest bidder and the trial court found that Anderson was a responsible bidder. But the trial court did not find that the *city authorities* so found him to be. The question was within the jurisdiction of that body.

There were objections to the testimony which was introduced to show the true grade of the street at the date of the improvement in order to sustain the defense that the work had not been done as required, with reference to the grade of the street. It is difficult to fully understand the bearing of some of this testimony, had on the issue, nor are we sure that we understand, to their full extent, the objections urged to this testi-

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mony. As the case is to be reversed, we will state that the grade of the street must be fixed by ordinance; that whatever book or books of profile are referred to by the ordinance should be fully identified; that, if the ordinance and book referred to therein do not establish a grade to a reasonable degree of certainty, then it would be void, and the natural surface would be taken as the true grade.

The foregoing considerations lead to a reversal of the judgment, unless we find, as contended by defendant's counsel, that other portions of the record show the judgment to be for the right party. These tax bills are against lots 6, 7 and 8 which are adjoining lots. They face south on Fourth street (the street improved), the side of lot 6 being also on Ohio street. A strip of forty-four feet in width, along Ohio street, was sold off the north end of lots 6 and 7, such strip fronting out east on Ohio street. The point is made that the entire lot, including this strip off the north end, is liable for the improvement. We are not of this opinion. The charter is that "for the payment of the cost of such improvement the city register shall levy a special tax on the property abutting on such street, avenue or alley, according to the respective fronts of lots so abutting thereon, and according to the amount and cost of work done in front of, or adjacent to, such lots." Our interpretation of this provision is, that the improvement is charged against the property which abuts the street improved at the time the lien attaches, regardless of the depth of the original lot. The property benefited and, consequently, the owner benefited is the abutting property and owner. The abutting owner has abutting rights, privileges, conveniences and advantages not common to others. The word "adjacent," in the foregoing section of the charter, has reference to the work done on the street within a certain length, which is to

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be levied as a tax on the abutting property according as the number of front feet is to the price of the whole work, both immediately in front and adjacent. The only authority cited bearing on the question is *Amery v. The City of Keokuk*, the words of the charter of that city being, "upon any lots or parcels of ground or *any part of either* of the same fronting upon, or lying along, the street." This is so different from the charter in this case as to render the case not applicable.

The next point relates to the notice given for the letting of the contract. The ordinance required that there should be published "in one or more of the daily papers published in Sedalia a notice stating that bids will be received * * * at least five days before the time fixed for opening the same." The notice was published in a daily paper issuing every day except Monday, the day on which the bids were to be opened. It was inserted on the eleventh, thirteenth, fourteenth, fifteenth and sixteenth, which last day was Sunday. Plaintiff's counsel insist that, since notice is not required by the city charter, it is not essential, and that the ordinance requiring such notice is merely directory. We are not of this opinion. We expressly so ruled in *Galbreath v. Newton*, 30 Mo. App. 380. See, also, *Keane v. Cushing*, 15 Mo. App. 96. Notice of the letting of contract for public work, the cost of which is to be collected from the citizen, *nolens volens*, by special assessment of his property, is certainly a matter "which affects the substantial rights of" such citizens. When such is the case, there must be "a fair compliance with all the conditions precedent, whether prescribed by charter *or ordinance*." *Cole v. Skrainka*, 105 Mo. 303. But the question remains, whether the notice as published is sufficient. The fact that the last publication was on Sunday does not affect the legality of this class of notices. *Taylor v. Palmer*, 31 Cal. 240. The

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only other objections which can be urged are that it was not published on Monday, the day the contract was let, and that it was not inserted on the twelfth. Neither of these objections is sound, under the ruling of *German Bank v. Stumpf*, 73 Mo. 311. That was a case involving the publication of a notice of a deed of trust sale, but is applicable here.

Counsel makes the further point that the property-owners should have been given an opportunity to do the work themselves before it was let out by the city. Our answer to this is, that no such requirement is found in the charter or ordinances. Other points made in support of the judgment being for the right party are not deemed tenable. The judgment is reversed, and the cause remanded. All concur.

BELLE MCNAIR ILGENFRITZ, Respondent, v. WILLIAM D. ILGENFRITZ, Appellant.

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Kansas City Court of Appeals, April 4, 1892.

1. **Married Woman:** SEPARATE PROPERTY: WEDDING PRESENTS: COMMON LAW: STATUTE. At common law the husband would be the owner of the wedding presents, but the language and intention of the married woman's act makes them the wife's separate property under her sole control, and it is not merely the object of the statute to free such property from the debts of the husband, but to divest him of all interest therein.

2. ———: ———: INTENTION OF DONOR. Wedding presents before the marriage are the wife's "at her marriage," those given her afterward come to her during coverture by gift; and in either instance are her statutory separate property, without any such intention of the donor appearing, the statute itself designating the effect of the gift.

3. ———: WIFE'S REMEDY IN EQUITY. The married woman's act does not authorize the wife to sue the husband at law; and the unity of husba..d and wife is not destroyed by these statutes.

Appeal from the Pettis Circuit Court.—HON. RICHARD FIELD, Judge.

AFFIRMED.

THIS action was brought in the circuit court of Pettis county, Missouri, returnable to the January term, A. D. 1890, of said court. The petition, omitting the caption, is in words and figures following, to-wit:

"Plaintiff states that she was legally married to the defendant on the twenty-second day of December, 1880, at the church near her father's house, in the city of St. Louis, and shortly thereafter came to her husband's place of residence in the city of Sedalia, bringing with her a large amount of personal property which belonged to her; that thereafter the plaintiff and defendant, as husband and wife, began housekeeping in certain premises, the property of plaintiff, and continued to live together at such home until December, 1887. That their said home was in a two-story, frame building, situated upon block —, in Stewart & Thompson's addition to the city of Sedalia, in said Pettis county and known as number 130, West Third street. That when they moved into said house and commenced housekeeping the plaintiff took with her, and placed in said building for the use of the family and for the ornamenting of their home, a large lot and great variety of personal property of the plaintiff, and afterwards, and from time to time as she acquired property of like character, she brought it to the said home for the purposes aforesaid. That all of said property was her sole and separate property acquired by her in her own right with her own means and by gifts from different persons. That said property is now, as plaintiff is advised and believes, stored and kept in said building or dwelling-house, and is in the use and possession of the defendant.

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Said property consists of the following articles: 'One case of silver, consisting of one dozen silver tea spoons, one dozen silver table spoons, one dozen silver forks, one butter knife, one sugar spoon,' marked, 'B. McN. I.' Then follows a long list of articles of similar nature, including also the following: 'One pair of white blankets, one white bed spread, one sewing machine—Wilcox & Gibbs' Automatic, one drop-light gas fixture and attachments, one ladies' writing desk and contents; wearing apparel and ladies' paraphernalia contained in bureau of north room, consisting of boys' long dresses, skirts, shawls, flannels, etc., etc., fancy work, pin cushions, bottles, crocheted mats, scarfs, etc., etc. Which are as plaintiff believes and avers of the aggregate value in cash of $750, but which being mostly of gifts and souvenirs are of a much greater value to plaintiff.'

"That afterwards, to-wit, in December, 1887, the plaintiff and defendant agreed to separate and live apart for a limited time, and she there and from time to time since then has demanded the articles of personal property aforesaid of the defendant, but he neglects and refuses to deliver the same to her, but wrongfully and unlawfully detains the possession thereof, from this plaintiff. Plaintiff states that all of said property being her sole and separate property as aforesaid she is entitled to the possession thereof, and the defendant refusing as aforesaid to deliver the same to her she has no manner of obtaining redress against the wrongs of the defendant and securing the said property which is rightfully hers as aforesaid, except through the intervention of this court, and that she is remediless in the courts of common law by reason of the facts aforesaid. That the defendant is wholly insolvent, and an action for damages against him would be wholly unavailing.

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That the plaintiff is informed and believes and, therefore, charges that the defendant on account of his feelings towards the plaintiff and his insolvent condition would, if opportunity was given him, remove, secrete and dispose of said property so as to prevent this plaintiff from securing the possession thereof, and that unless he be prohibited and restrained by the orders of this court he will make way with said property, and the whole thereof, and further wrong this plaintiff. That said property by reason of its character and associations connected with it, consisting of gifts from her family and friends, is of a value for which the plaintiff cannot be recompensed in damages, and the destruction or removal of the same beyond her reach would be of such loss and damage to her as is not measured or estimated in legal proceedings.

"Wherefore plaintiff prays by reason of the premises that this court will by its order and decree temporarily restrain and enjoin the defendant from making any disposition of said property either by selling, removing or otherwise disposing of the same, and that this court during the pendency of this litigation will appoint some responsible and disinterested person as a receiver, who, under the order and direction of this court, shall take possession of said property and shall the same safely keep under the orders and directions of this court, to abide the result of this suit; and that upon a final hearing thereof the court will adjudge the right of the possession of said property and the ownership thereof to the plaintiff and direct that the same be delivered to her and that she have judgment against the defendant for her costs in this behalf laid out and expended, and she prays for all other and further relief that to the court may seem meet and proper."

On the twenty-eighth of November, 1888, the judge of said court in chambers issued an order appointing

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Ellis R. Smith a receiver, to take into his charge and possession the property described in the foregoing bill. And in pursuance of said order the said receiver took possession of the property therein described, and the same is still remaining in his possession.

On the tenth day of May, 1889, the defendant filed in said cause an answer in the words and figures following, to-wit: "Comes now the defendant and for answer to the plaintiff's petition herein, and not hereby waiving the right to show upon the trial of this cause that said petition does not state facts sufficient to constitute a cause of action, and that plaintiff cannot maintain this action, states: That he admits that he and the plaintiff were married on the twenty-second day of December, 1880, and that shortly thereafter plaintiff came with defendant to the city of Sedalia; but he denies that she brought with her a large amount of personal property, or any personal property which belonged to her. The plaintiff admits that some time thereafter they went to housekeeping in the city of Sedalia, at number 1301, West Third street, but defendant says it is not true; that when they did so plaintiff took with her and placed in said building any personal property, or that she afterwards acquired property of like character and placed it in said house. Plaintiff denies that any of the property described in plaintiff's petition herein was acquired by her in her own right, with her own means, or by gifts from different persons, except as hereinafter stated. Plaintiff avers that the following articles of personal property mentioned in plaintiff's petition were bought and paid for by plaintiff, as articles of household use, for himself and his family, viz."— Here follows a list of articles.

"And that all of the other articles not bought by the plaintiff, with money furnished by the defendant or paid for by her with money so furnished, or paid for

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by him after being bought by her, were simply the usual and ordinary wedding presents, given by the different relatives and friends of plaintiff and defendant. And defendant avers that none of the wedding presents were given to plaintiff as her sole and separate property, nor intended as such by the various donors, being entirely articles of household ornament and use, intended to decorate and ornament the home of plaintiff and defendant, and for the joint use and comfort of plaintiff and defendant, as husband and wife; that it was never intended by the donors of said articles to bestow them upon plaintiff, solely, so as to enable her to sell or dispose of the same, or to remove them from their home, or to bestow them upon others, and that she now has no right to the possession of the same, to the exclusion of defendant, nor except in the home which this defendant has always provided for the plaintiff, and where he has always kept the same, ever since the plaintiff deserted and abandoned defendant, as hereinafter stated. Defendant denies that the said articles are of value of $750.

"Defendant admits that in December, 1887, the plaintiff and defendant agreed to live separate for a limited time, but defendant avers that said agreement was not willingly entered into by him. Defendant denies that he is insolvent; he avers that none of his creditors, nor anyone else has attempted to seize or interfere with the property described in plaintiff's petition, nor is there any danger of the same being taken away from defendant, under any pretense, so as to be lost to plaintiff. And defendant avers that plaintiff has no right in law or equity, while she remains the wife of defendant, to maintain this action against defendant, for the sole and only purpose of dispossessing defendant of said articles, and for the purpose of removing them from his said home, and taking the sole

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and exclusive possession of them while wilfully living away from defendant, in defiance of her duty under the law of the land.

"Wherefore defendant prays that the receiver heretofore appointed by this court be ordered to return all of said property to this defendant, and that said receiver be discharged, and that this cause be dismissed; that defendant go hence without day."

Wm. S. Shirk, for appellant.

(1) The petition does not state a cause of action in equity. It shows upon its face, that if plaintiff is entitled to the possession of the property described in the petition her remedy is at law, by replevin. Therefore no evidence should have been admitted. R. S. 1889, secs. 1996, 6864, 6869; *Hendricks v. Woods*, 33 La. Ann. 1052; *Wilson v. Wilson*, 36 Cal. 451; *Larison v. Larison*, 9 Ill. 27. (2) The decree of the court is wrong. At common law the property would have immediately become the husband's—as to this there is no dispute. And section 6869, Revised Statutes, 1889, was not intended to cover nor does it include property of the character in plaintiff's petition described, nor was it intended to enable the wife to withdraw from the husband the use and enjoyment jointly with her of the wife's personalty, but only to protect the wife's property against her husband's creditors, and from sale or disposal by him against her will. (3) Nor is she entitled to the exclusive possession of such property, as against her husband, for the mere purpose of disposing of them herself, or withdrawing them from the uses for which they were donated. (4) To vest a separate title in the wife to property given her by a person other than the husband, a clear intention of the donor, that it is for her separate use, must appear. Here no such intention appears. 1 Bishop on Married Women,

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sec. 228; *Carroll v. Lee*, 3 Gill & Johns. 504; *Demming v. Williams*, 26 Conn. 226; *Hamilton v. Bishop*, 8 Yerger, 33. And this rule is not changed by the statute. *Seitz v. Mitchell*, 94 U. S. 580, 583.

Jackson & Montgomery, for respondent.

(1) The suit was properly brought in equity. A wife cannot sue her husband at law. *Walter v. Walter*, 48 Mo. 140–145; *Rieper v. Rieper*, 79 Mo. 352–359. The statute making gifts to a married woman her separate property does not change this rule. Nor is there anything in the Revised Statutes of 1889, authorizing a married woman to sue as a *feme sole*, which alters the character of suit she should bring against her husband. Equity had jurisdiction of such suits before the statute, and, even if it was the design of the statute to authorize a wife to sue her husband at law, it did not prevent a suit in equity. *Stewart v. Caldwell*, 54 Mo. 536–539; *Pratt v. Clark*, 57 Mo. 189–192; *Sav. Inst. v. Collonious*, 63 Mo. 290–294. (2) By virtue of section 6869, Revised Statutes, 1889 (R. S. 1879, sec. 3296), the property mentioned in the petition was and remains "her separate property and under her sole control." There is no exception in favór of the husband, and the statute, of necessity, applies to him as much as if not more than to anyone else. *Rieper v. Rieper*, 79 Mo. 352. (3) It is not necessary that a gift to the wife should be accompanied with any words manifesting an intention to create a separate estate. The statute supplies the intention, and of its own force makes every gift to the wife her separate property. *Hart v. Leete*, 104 Mo. 315–332.

Ellison, J.—This action is in equity and is brought by the plaintiff against defendant, her husband. We have set out the pleadings in the statement, to which

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reference is made, that the nature of the relief and the kind of property may be ascertained. The evidence shows that at the time of their marriage, in 1880, the friends of the plaintiff gave to her a part of the articles described in petition, as "wedding presents," the remainder were given to her by her parents and other friends after the marriage, "in the nature of wedding gifts." All the articles are either of household use or ornament, and all were given to her either in view of her approaching marriage to defendant, or afterwards, for household use. No words accompanied the gifts, evidencing the intention of the donors to give her separate ownership—simply the usual words of compliment to her, and the plaintiff herself says, "They were given to me with the purpose in view, so far as I know, of using them as a married woman, in my home after I was married," and "They are things that I certainly had no use for in the world as a single woman." After the marriage, these articles were taken to their home in Sedalia, where they remained until taken therefrom by the order of the court in this case.

On the thirtieth day of November, 1887, plaintiff and defendant entered into an agreement that they should live separate for a short time. The defendant admits that they agreed to separate for awhile, but averred that such agreement was not willingly made by him, but solely in the hope that they would again unite. Failing to do so, he withdrew from said agreement and demanded that she return to her home, where he was ready to provide for her, and in which he had kept all the articles described.

It is conceded by the parties that at common law the husband would have been the owner of the articles of property enumerated in plaintiff's petition, and her claim or right is based upon section 6869, Revised Statutes, 1889, wherein it is enacted that: "All real estate

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and personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or has grown out of any violation of her personal rights, shall, together with all income, increase and profit thereof, be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband. This section shall not affect the title of any husband to any personal property reduced to his possession with the express assent of his wife: provided, that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless by the terms of said assent, in writing, full authority shall have been given by the wife to the husband to sell, incumber or otherwise dispose of the same for his own use and benefit; but such property shall be subject to execution for the payment of the debts of the wife contracted before or during marriage, and for any debt or liability of her husband, created for necessaries for the wife or family; and any such married woman may in her own name, and without joining her husband as a party plaintiff, institute and maintain any action, in any of the courts of this state having jurisdiction for the recovery of any such personal property, including rights in action as aforesaid, with the same force and effect as if such married woman was a *feme sole:* provided, any judgment for costs in any such proceeding, rendered against any such married woman, may be satisfied out of any separate property of such married woman subject to execution."

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Defendant contends that this statute does not confer upon the wife the right to an exclusive possession of the property therein described as against the husband. We are of the opinion that the language of the statute, as well as the apparent intention, does not justify defendant's construction. It is declared that the property shall be the wife's separate property and shall be under her *sole* control. It cannot reasonably be contended that the only or chief object of the law-makers was to free such property from the debts of the husband. The intention was, furthermore, to divest the husband of all interest therein. It is contemplated by the statute that the husband may use and care for such property, but this is evidently in recognition of the fact that usually such property will be under the care and protection of the husband by reason of their harmonious marital relation; the wife's consent to such use and care resulting from such relation. The use and care of such property by the husband is essentially permissive. This care and protection is in the nature of an agency. This construction is strengthened by the additional provision of the same statute, which clothes her with the power and right to protect such property and her rights therein by suit, without joining her husband.

It is next insisted that, to vest a separate title in the wife to property given to her by a person other than her husband, a clear intention on the part of the donor that it is for her separate use must appear. We rule the point against defendant. The wedding presents given to her before the marriage ceremony were her property "at her marriage." And the presents which were given to her after her marriage were property which "came to her during coverture, by gift." In either instance the property is her statutory separate estate, and an intention on the part of the donor need

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not appear in order to make it her separate property; the statute itself designates the effect of the gift.

It is further insisted that, under the provisions of our present statute, plaintiff had a remedy at law by bringing an action of replevin against defendant, and that, therefore, a bill in equity cannot be sustained. The sections relied upon are the following, in addition to section quoted above (R. S. 1889, sec. 1996): "A married woman may, in her own name, with or without joining her husband as a party, sue and be sued in any of the courts of this state having jurisdiction, with the same force and effect as if she was a *feme sole*, and any judgment in the cause shall have the same force and effect as if she were unmarried." R. S. 1889, sec. 6864. "A married woman shall be deemed *feme sole* so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party: provided, a married woman may invoke all exemption and homestead laws now in force for the protection of personal and real property owned by the head of a family, except in cases where the husband has claimed such exemption and homestead rights for the protection of his own property."

In our opinion, neither of these statutes authorizes the wife to sue the husband at law. They give her the right to sue without joining her husband as a party plaintiff—she may bring her action independent of her husband—and a third party may sue her without joining the husband as a party defendant. But she is not empowered to sue her husband. The unity of husband and wife is not destroyed by these statutes. They are, as before these statutes, one legal entity in the eye of

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the law, except as they are separated by the express provisions of the statute, or necessary implications arising from such provisions.

We are cited to the cases of *Larison v. Larison*, 9 Ill. 27, and *Wilson v. Wilson*, 36 Cal. 451, where the husband is sued at law by the wife. In the former case, the action is for injuries to her property; and, in the latter, on a promissory note. But in each case a statute is cited, giving authority in express words for either to sue the other.

What we have said in this opinion sufficiently disposes of the question as to striking out a portion of the answer.

Other points suggested by defendant are not deemed tenable, and the judgment will be affirmed. All concur.

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DAVID S. CUMMINGS *et al.*, Respondents, v. JOHN HURD *et al.*, Appellants.

Kansas City Court of Appeals, April 4, 1892.

1. **Principal and Agent:** AGENCY, HOW CREATED. An agency may be created by the express words or acts of the principal, or it may be implied from his conduct and acquiescence, and the nature and extent of the agent's authority may be implied from circumstances, but will be limited to acts of like nature with those acquiesced in by the principal.

2. ———: PAYMENT OF SECURITY: POSSESSION BY AGENT. If a debtor pays a written security to one as agent it is his duty at his peril to see that the person thus paid is in possession of the security; and if such person is not in possession thereof the debtor must show that such person has special authority, or has been represented by the creditor to have such special authority.

3. **Mortgages:** SATISFACTION. The true holder of the note can alone satisfy the record, and the possession of the deed of trust gives no authority, and one who, without the production of the note, takes satisfaction of the deed of trust is charged with notice of the lack of authority.

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4. **Principal and Agent:** NOTE PAYABLE AT OFFICE: AGENCY. Designating the office of a certain person as the place of payment of a note does not give such person authority to collect the note; the payor should always insist on the production of the note, and where there is any suspicion as to the agency should inquire of the principal.

5. **Practice, Appellate:** ESTOPPEL: PLEADING: EVIDENCE. Where there is no sufficient evidence in the abstract to support the plea of estoppel it becomes unnecessary to consider whether that defense is well pleaded.

6. **Fraud:** NEGLIGENCE: INNOCENT PARTIES. When one of two innocent parties must suffer, the loss must fall upon him whose negligence brings it about.

Appeal from Henry Circuit Court.—HON. D. A. DEARMOND, Judge.

REVERSED AND REMANDED (*with directions*).

Thomas M. Casey, for appellants.

(1) Hurd, the defendant, as the innocent holder for value without notice of the bond sought to be enjoined, cannot be bound by the unauthorized acts of Cheek. The fact that he bought the bond of Cheek does not give Cheek any right to meddle with Hurd's rights. Payment to Cheek, who neither had the possession of the bond nor authority to collect, is no protection. *Tappan v. Morseman*, 18 Iowa, 499; *Austin v. Thorp*, 30 Iowa, 376; *Cooley v. Williams*, 34 Ill. 68; *Smith v. Kidd*, 68 N. Y. 130; *Ritch v. Smith*, 82 N. Y. 627; *Grewster v. Cames*, 103 N. Y. 556; *Crane v. Gruenewald*, 120 N. Y. 274; Mechem on Agency, sec. 373; Dunlap's Paley's Agency, 274, 275. (2) It is now the general rule that, if a debtor, owing money on a written security, pays or settles with another as agent, it is his duty at his peril to see the person thus settled with is in possession of the security. *Tappan v. Morseman, supra; Smith v. Kidd*, 68

N. Y. 130-141; *Henn v. Conisby*, 1 Ch. Cases, 93; Story on Agency, secs. 98, 104; 2 Parsons on Bills; *Williams v. Walker*, 2 Sand. Ch. 325; *Doubleday v. Kress*, 50 N. Y. 410. Nor is there the slightest evidence that David Cummings acted upon any knowledge that Cheek had ever collected any other bonds for Hurd. He testified he knew nothing of their dealings. (3) The fact that Cheek negotiated the loan and was made trustee in the deed of trust did not justify the payment to Cheek in the absence of the possession of the bond. Had he called for the note and insisted upon its production he would have learned Cheek did not have it, and this alone would have put him on his guard. *Cooley v. Williams*, 34 Ill. 68. (4) The bond was not only not in Cheek's hands, but was not due. *Smith v. Kidd*, 68 N. Y. 141; *Doubleday v. Kress*, 50 N. Y. 410; Mechem on Agency, sec. 380; *Quigley v. Bank*, 80 Mo. 289; *Parnther v. Gaitskell*, 13 E. Rep. 437; 2 Greenleaf on Evidence, sec. 65. (5) Cheek was Cummings' agent. The fact that the bond was payable at his office justified the holders of the coupons and bonds to send them there for collection. As to those sent to him, he was the agent of Hurd, but as to bonds or coupons not sent to him he had no authority to collect. *Ward v. Smith*, 7 Wall. 447; *Knox Co. v. Groggin*, 16 S. W. Rep. 684. (6) Hurd's uncontradicted evidence is that he knew nothing of Cheek's having this money, and Cummings swears he never notified Hurd. *Owing v. Hull*, 9 Pet. 629; *Baldwin v. Bennows*, 47 N. Y. 212. (7) Hurd kept his bond; Cummings trusted Cheek. When one of two innocent parties must suffer, the loss must result to the one whose negligence brings it about. Had Cummings acted with common sense and kept his money till he received the bond he could not have been hurt. *Smith v. Kidd*, 68 N. Y. 130.

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Calvird & Lewis, for respondents.

(1) A single act by an agent and a recognition by the principal may be such as to bind the principal in subsequent acts of like character. *Stothard v. Aull*, 7 Mo. 318; *Fayles v. Ins. Co.*, 49 Mo. 380; *Wilcox v. Railroad*, 24 Minn. 269. (2) An agency and the extent of authority may be inferred from circumstances. *Mitchum v. Dunlap*, 98 Mo. 418; *Hull v. Jones*, 69 Mo. 587. (3) The evidence shows such a continuous course of dealing between Hurd and Cheek as to amply support a finding that Cheek was the established general agent of Hurd to collect principal as well as interest on loans, and, therefore, a payment to Cheek discharged the $200 bond. *Gibson v. Zeibig*, 24 Mo. App. 65; *McGinnis v. Mitchell*, 21 Mo. App. 493; *Security Co. v. Richardson*, 33 Fed. Rep. 16; *Quin v. Drisbach*, 16 Pac. Rep. 762; *Sax v. Drake*, 69 Iowa, 760; *Simon v. Brown*, 38 Mich. 552; *Matterson v. Black*, 46 Mich. 393; *Minter v. Railroad*, 41 Mo. 508. (4) As between Hurd, the mortgagee, and the plaintiffs, Hurd should bear the loss, by reason of his permitting the mortgage itself to be surrendered up. *Heyder v. Bldg. Ass'n*, 8 Atl. Rep. 310. (5) John Hurd is estopped to deny that Cheek was his agent in dealing with the Henry county borrowers. Bigelow on Estoppel [5 Ed.] p. 565; Mechem on Agency, sec. 84; *Fanning v. Cobb*, 20 Mo. App. 577; *DeBaum v. Atchison*, 14 Mo. 543; *Rice v. Groffman*, 56 Mo. 443; *Cupples v. Wheeler*, 61 Mo. 583. (6) The law of commercial paper is not involved in this case, as Hurd was the payee in the $200 bond, and had never parted with it.

R. T. Railey and *Frank Hagerman*, for appellants, in reply.

(1) The true holders of the note can alone satisfy the record, and the possession of the deed of trust gives

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no such authority (*Lee v. Clark*, 89 Mo. 553; *Hagerman v. Sutton*, 91 Mo. 519); but, on the contrary, one who without the production of the note takes a satisfaction of the deed of trust is charged with notice of the lack of authority. Jones on Mortgages [2 Ed.] sec. 476. Naming Cheek's office as the place of payment gave no authority to Cheek to collect. 1 Randolph on Commercial Paper, sec. 125; *Glatt v. Foreman*, 120 Ind. 384; *Ward v. Smith*, 7 Wall. 447; *Groggin v. Knox Co.*, 16 S. W. Rep. 684; 3 Randolph on Commercial Paper, sec. 1415; Mechem on Agency, sec. 290. (2) There was no agency by estoppel.

SMITH, P. J.—The defendants have brought this case here by appeal to review the action of the circuit court in entering a decree, forever enjoining defendant John Hurd from the collection of a negotiable bond for $200 and the interest coupons attached. This bond was duly executed and delivered for value to Silas E. Cheek, October 25, 1882, payable five years after date and bearing eight-per-cent. interest. This bond and coupons were sold to defendant Hurd in Bridgeport, Connecticut, for full value. He has ever since been the owner and holder. The bond has never been out of his possession since he bought it. At the time it was executed, Cummings, the maker, also executed another bond for $1,000, due in five years. Cheek also sold this other bond to defendant Hurd. Hurd sold this $1,000 bond to Mrs. Lyman of Bridgeport, Connecticut. Afterward, in 1883, James F. Cummings, the maker of these bonds, sold the lands which he had conveyed by deed of trust to Cheek to secure these bonds and interest, to his brother, David S. Cummings, and Cummings conveyed the same to Henry Lane and Mrs. Sarah Lane. After David Cummings bought the lands, and long before the maturity of the bonds, he applied to Cheek

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to pay off the same. Cheek did not have either of the bonds at the time, and Cummings refused to pay either till he received them. After some months Cheek succeeded in getting Mrs. Lyman's bond of $1,000 and then Cummings paid that off, and although Cheek did not have the $200 bond Cummings claims he paid that also. However, he produced no receipt or check or other voucher showing that he had paid it, except the record entry. By that, it appears Cheek made no claim of being Hurd's agent. He claimed to be the owner and assignee of the bond in suit.

Cheek absconded in December, 1885, and has not been seen since. Hurd's evidence stands uncontradicted that he bought the bond and coupons enjoined before due. It is not asserted he knew of any agreement between Cheek and James Cummings that this bond could be paid off before maturity. In the business communications between Hurd and Cheek, there is not a sentence, line or syllable that tends to make Cheek Hurd's general agent. These letters show no more than that there were remittances from one to the other during the continuance of their business relations. When Cheek would send Hurd a bond and mortgage which the latter could use he would either remit for it or authorize the former to draw for the amount of security purchased. It too appears thereby that Hurd transmitted from time to time as they fell due the coupons for collection. In one or more instances the bonds themselves were sent for collection.

David S. Cummings' testimony shows that he kept the money in bank for months before Cheek could get Mrs. Lyman's bond, "because it was not business to pay it without taking up the bond," and yet when Cheek finally got that bond, he paid this one without getting it or any security against it. The whole case in a nutshell is that James Cummings made the bond,

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received the money for it, gave the mortgage now sought to be enjoined, that Hurd bought the bond in good faith before maturity for value, and was holder when David Cummings paid the money to Cheek. David Cummings bought the land with full notice of the mortgage, and the Lanes bought of David with full notice.

It seems to us that the decisive question presented by the appeal in this case is that of agency or whether Cheek had authority to receive payment of the Cummings bond for $200 while it was in the actual custody of Hurd who was the purchaser thereof, for value before maturity. If he had not such authority he could not enter full satisfaction of the deed of trust on the margin of the record. An agency may be created by the express words or acts of the principal, or it may be implied from his conduct and acquiescence, so the nature and extent of the authority of an agent may be implied or inferred from circumstances. If the agency arises by implication from numerous acts done by the agent with the tacit consent or acquiescence of the principal, it is deemed limited to acts of like nature. *Sharp v. Knox*, 48 Mo. App. 169; *Gibson v. Zeibig*, 24 Mo. App. 66; *Grocery Co. v. Capen*, 23 Mo. App. 301; *Wheeler v. Metropolitan Co.*, 23 Mo. App. 190; *Brooks v. Jamison*, 55 Mo. 505; *Franklin v. Globe*, 52 Mo. 461; *Edwards v. Thomas*, 66 Mo. 468; Greenleaf on Evidence, sec. 60; Story on Agency, secs. 45, 87. And where it appears that an alleged agent has repeatedly performed acts like the one in question which the principal has ratified and adopted, his authority for the performance of the disputed act may be inferred. Mechem on Agency, sec. 86; *Jewett v. Railroad*, 10 Ind. 586; *Fisher v. Campbell*, 9 Port. (Ala.) 210; *Ransom v. Curtis*, 19 Ill. 456; *Emerson v. Coggswell*, 16 Me. 77:

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Walsh v. Pierce, 12 Vt. 100; *Downer v. Monsron*, 2 Gratt. (Va.) 237.

Now, applying the rules to which we have just adverted, to the facts in the case before us, and the conclusion is irresistible that the collection of the Cummings bond by Cheek was an unauthorized act of his. It is a noticeable fact that in the correspondence between Hurd and Cheek, as well as in the entire evidence, there does not appear a single instance where the latter collected a bond for the former without having possession of the security. There is no proof that Cheek repeatedly performed acts like the one in question which were ratified and adopted by Hurd. Certainly the fact that Cheek had the custody of the $1,000 bond of Mrs. Lyman and the deed of trust and was authorized to receive payment of the bond, and to enter satisfaction on the deed of trust on the record to that extent, did not confer the semblance of an authority upon him to collect the Hurd bond and satisfy the deed of trust as to it. The evidence discloses no word or act of Hurd creating any such agency, nor does it disclose any circumstance from which it can be reasonably inferred. Since Cheek had neither the custody of the Hurd note nor authority to collect it, the payment of it to him by Cummings under such circumstances was as if it had not been paid at all.

It is a well-settled general rule that, if a debtor owing money on a written security pays to or settles with another as agent, it is his duty at his peril to see that the person thus paid, or settled with, is in possession of the security. If not thus in possession, the debtor must show that the person to whom he pays or with whom he settles has special authority, or has been represented by the creditor to have such authority, although for some reason not in possession of the secur-

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ity. *Freeman v. Whitford*, 39 Mo. App. 311; *Sharp v. Knox, supra; Tappan v. Morseman*, 18 Iowa, 499; *Austin v. Thorp*, 30 Iowa, 376; *Cooley v. Williams*, 34 Ill. 68; *Smith v. Kidd*, 68 N. Y. 136; *Ritch v. Smith*, 82 N. Y. 627; *Brewster v. Cames*, 103 N. Y. 556; *Doubleday v. Kress*, 50 N. Y. 410; *Parnther v. Gaitskell*, 13 East. 437; 2 Greenleaf on Evidence, sec. 65; Jones on Mortgages [4 Ed.] sec. 964.

The true holder of the note can alone satisfy the record, and the possession of the deed of trust gives no authority (*Lee v. Clark*, 89 Mo. 553; *Hagerman v. Sutton*, 91 Mo. 519), but on the contrary one who, without the production of the note, takes satisfaction of the deed of trust is charged with notice of the lack of authority. Jones on Mortgages [2 Ed.] sec. 476.

Designating the office of Cheek as the place of payment gave Cheek no authority to collect the note. 1 Randolph on Commercial Paper, sec. 125; *Glatt v. Foreman*, 120 Ind. 384. The payor always has the right to insist, and should for safety do so, that the obligation be surrendered as a condition of payment. 3 Randolph on Commercial Paper, sec. 1415. And if there is any reason for suspicion of lack of authority inquiry should be made of the principal. Mechem on Agency, sec. 290. It follows that, as Cummings paid Cheek the Hurd bond without receiving it, he must be held as charged with notice of the lack of authority, unless the evidence clearly shows, as it does not, specific authority to act in that particular case. The release of the deed of trust was, therefore, a nullity.

As the abstract contains no sufficient evidence to support the plea of estoppel *in pais*, it becomes unnecessary to consider whether that defense is well pleaded in the answer. The release by Cheek upon the margin of the record of the deed of trust shows that Cummings dealt with Cheek as the "assignee and legal holder of

the bond," and not as the agent of Hurd. There can be no contention that there is anything in the evidence to justify the conclusion that Cummings was induced by any act of Hurd to deal with Cheek as the assignee and legal holder of the bond. The element of estoppel does not appear in the case. *Chouteau v. Goddin*, 39 Mo. 230.

The plaintiffs insist that, as between Hurd and them, the loss occasioned by the fraud of Cheek should fall on Hurd for the reason that he permitted the deed of trust to be surrendered up. We cannot assent to this. Hurd did not surrender it to Cheek. Mrs. Lyman, owning the larger bond, had at least as much right to the possession of that instrument as Hurd. If Cummings had taken the precaution to have required the production of the $200 bond before he paid it, and took satisfaction of the deed of trust he would not have been the victim of the fraud of Cheek.

It was his neglect to require this that made the fraud possible. The rule is that, when one of two innocent parties must suffer, the loss must fall upon him whose negligence brings it about.

Upon no principle with which we are acquainted can the decree in this case be upheld. It must be reversed, and the cause remanded with directions to enter judgment for defendants. All concur.

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WILLIAM DODSON, Appellant, v. ELLIOT CLARK, Respondent.

Kansas City Court of Appeals, April 4, 1892.

1. **Mortgages:** SATISFACTION: COSTS. On full satisfaction of the mortgage debt, the mortgagee, at the request of the mortgagor for a release of the mortgage, has his option to go to the recorder's office and indorse satisfaction on the margin or make and deliver a deed of

release; and, if it is reasonably inconvenient to make the marginal entry, he may adopt the other mode at the cost of the mortgagor; and, if he accepts the costs tendered for either mode, he must pursue that mode.

2. **———: WHAT IS SATISFACTION. If a mortgagee accepts goods, and delivers up the note and mortgage with intent thereby to relinquish any further claim thereon, then there is a full satisfaction of the mortgage.**

3. **———: SATISFACTION: COSTS. A mortgagee cannot be held for not releasing a satisfied mortgage, unless it appear that the alleged payment of costs was made on account of the mortgage sought to be released.**

Appeal from the Jasper Circuit Court.—HON. JOSEPH D. PERKINS, Special Judge.

REVERSED AND REMANDED.

E. O. Brown and *Flanigan & Booth*, for appellant.

No brief for respondent.

GILL, J.—When this cause was here before (38 Mo. App. 150), we found error in that the circuit court peremptorily instructed for the defendant,. whereas the evidence tended to establish such facts as would warrant a verdict for the plaintiff. On a retrial in the court below a verdict and judgment was had in defendant's favor, and plaintiff again appeals to this court.

I. Our opinion now will be merely supplemental to what was said when the case was here on the first appeal. The law applicable to cases of this kind is found in sections 7094 and 7095, Revised Statutes, 1889, or sections 3311 and 3312, revision of 1879. It is there provided that, when the mortgagee receives full satisfaction of his debt or mortgage, he shall, at the request and at the cost of the mortgagor, acknowledge satisfaction of the mortgage in two ways, to-wit, either by

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indorsing said satisfaction on the margin of the mortgage record, or by delivering a sufficient deed of release to the mortgagor. Should the mortgagee, after payment of the debt followed by request and tender of costs, fail, for the period of thirty days, to enter such satisfaction on the record, or fail, as the case may be to deliver such deed of release, then such mortgagee subjects himself to an action by the mortgagor. Now, under the evidence and claims made in this case, it becomes necessary to determine what is included under the designation of *costs* which shall be paid or tendered by the mortgagor to the mortgagee. The defendant mortgagee, it seems, resided in the country and about ten miles from the county seat where the records are kept; that, at this place, plaintiff paid defendant the recorder's charges for marginal satisfaction of the record, but nothing more. It is the defendant's contention (and seems so to have been held by the trial court), that the costs to be paid by the plaintiff mortgagor include not only the fees necessary to be paid the recorder, but as well the necessary trouble and expense the mortgagee may be subjected to in getting to and from the county seat. We do not think this to be the meaning of the statute.

The parties to a mortgage contract with reference to the provisions of the law. The case stands as if these sections of the statute were bodily incorporated in the mortgage deed. When the debt is paid, and the mortgage, therefore, satisfied, the mortgagee undertakes and is bound to satisfy the record—either by going to the recorder's office and indorsing satisfaction on the margin of the record, or at his option make and deliver a deed of release; provided only, that the cost to be paid for entering such marginal record satisfaction or cost of making the deed of release be paid by the mortgagor. The two means for relieving the record of

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the apparent incumbrance are open to the election of the mortgagee. If the mortgagee shall reside or shall, at the time of the request and tender by the mortgagor, be at such distance from the records that it would be expensive, or, by reason of loss of time or distance to be traveled, it would be reasonably inconvenient to go and enter the marginal satisfaction, then the mortgagee may adopt the other mode, and may, at the cost of the mortgagor, execute and deliver a deed of release. We must presume that the mortgagee knows the law. He knows, when approached by the mortgagor who demands satisfaction of the records, that it may be accomplished in either of the two modes, to-wit, by going to the recorder's office and there entering a marginal satisfaction or by executing a deed of release, and it is incumbent on the mortgagee to pursue the one or the other course if the necessary cost be tendered. If he accept a tender of the necessary amount offered for the purpose of a marginal satisfaction, it then becomes his duty to go to the recorder's office and relinquish his incumbrance by that mode, or, if he have tendered and accepted the necessary cost of the making a deed of release, it then likewise becomes his duty to execute and deliver such instrument.

Now, as to the case at bar, we have nothing to do with the matter of satisfying the mortgage record by a deed of release. If anything, it is a case where the mortgagor paid the mortgagee the necessary cost for a marginal satisfaction. Unquestionably, the sum paid was just the amount required by the recorder of deeds for such satisfaction, but there is no pretense that the mortgagor requested or even expected a deed of release, nor was any tender of costs made for such an instrument. It was, therefore, unnecessary, to say the least, to incumber the instructions or embarrass the jury with any reference to such matter.

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There was, however, evidence at the trial tending to prove that the mortgage debt had not been entirely paid. Defendant Clark's testimony tended to show that he had agreed on a satisfaction of the mortgage claim on the delivery to him of a certain portion of the mortgaged goods, but that a certain canvas covering for a machine had not been delivered as Dodson promised, and that he, Clark, had never agreed to accept the other goods in payment of the debt. As to this, it is sufficient to say that unless the debt was paid in full, or, as the statute puts it, unless the "mortgagee receive full satisfaction" of the mortgage debt, then it is clear the plaintiff had no case. But if, on the other hand, defendant Clark did accept the goods delivered, and did deliver up the note and mortgage with the intent thereby to relinquish any further claim thereon against Dodson, then there was such a full satisfaction of the mortgage as the statute contemplates.

There was, too, some evidence on the part of the defendant tending to prove that the twenty-five cents cost for satisfying the record was paid and accepted by him for, and on account of, the charges for satisfying a prior mortgage held by him (Clark) against Dodson, and which had been satisfied on record at defendant's expense. It is clear that defendant cannot be held in this action except it appear that such payment of costs was made on account of the mortgage dated October 9, 1886, and was so understood by defendant at the time.

It follows then that the judgment must be reversed, and the cause remanded. All concur.

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JOSEPH LOWRIE, Defendant in Error, v. GODFRIED ZUNKEL, Plaintiff in Error

Kansas City Court of Appeals, April 4, 1892.

1. **Bills and Notes:** PAYABLE TO MAKER: LAW MERCHANT: STATUTE. By the law merchant a note payable to the order of the maker is a nullity till negotiated, but when negotiated by indorsement and delivery it becomes payable to the bearer; by section 735, Revised Statutes, 1889, such a note becomes payable to the bearer by delivery for value without indorsement.

2. **Definitions:** "NEGOTIATED." "Negotiated" in section 735, Revised Statutes, 1889, means more than indorsement only; it means delivery as well, or put upon the market.

Appeal from the Buchanan Circuit Court.—HON. A. M. WOODSON, Judge.

AFFIRMED.

Jas. F. Pitt, for plaintiff in error.

(1) Defendant's second instruction should have been given, because the paper was not negotiated in the sense of that term in section 735, Revised Statutes, 1889. A maker may issue his paper without indorsement. But to negotiate any commercial instrument payable "to order" it must be indorsed. *Rice v. McFarland*, 34 Mo. App. 410; *Patterson v. Cave*, 61 Mo. 441; *Osgood v. Artt*, 17 Cent. L. J. 190; *Miller v. Weeks*, 22 Pa. St. 89; *Wilder v. DeWolf*, 24 Ill. 191; *Nicoll v. Ogden*, 29 Ill. 823. (2) At common law a note to the maker's own order, or to the order of a fictitious person, was in disrepute, and this statute affords relief. See Daniels on Negotiable Instruments, secs. 130, 136. But it was not intended to affect the law of contracts,

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or to make that a note which was not so before. *Muldrow v. Caldwell*, 7 Mo. 565.

Charles L. Simmons, for defendant in error.

But to say that notes subject to section 733 must be indorsed, while those subject to section 735 pass by delivery alone, is to make a harmonious and homogeneous whole out of the otherwise discordant and absurd statute. It has been held from time immemorial that bills of exchange payable to fictitious payees can be negotiated without indorsement, and are, in effect, the same as if payable to bearer. *Minet v. Gibson*, 3 Term. Rep. 482; *Phillips v. Imthurm*, 114 E. C. L. 692; *Collins v. Emmett*, 1 H. Bl. 313; Story on Bills, 56, 200; 3 Kent's Commentaries, 77, 78; *Farnsworth v. Drake*, 11 Ind. 103; *Bolles v. Stearnes*, 11 Cush. 320; *United States v. White*, 2 Hill (N. Y.) 154; *Plets v. Johnson*, 3 Hill, 112; *Foster v. Shattuck*, 2 N. H. 446; *Elliott v. Abbott*, 12 N. H. 549; *Blodgett v. Jackson*, 40 N. H. 21; *Forbes v. Espy*, 21 Oh. St. 483; *Kohn v. Watkins*, 26 Kan. 691; *Hortsman v. Henshaw*, 11 How. (U. S.) 177; *Lane v. Krekel*, 22 Iowa, 404; *Rogers v. Ware*, 2 Neb. 29; 1 Parsons on Bills & Notes, 32, 560, 591, 592, and notes; 2 Parsons on Bills & Notes, 48–50; Edwards on Bills, 125–130; Chitty on Bills, 158, and note; *Cowgill v. Bank*, 1 N. Y. 113; *Dana v. Underwood*, 19 Pick. 99, and many other cases.

Ellison, J.—This action is on the following promissory note payable to the maker's order:

"$499.37. Kansas City, September 1, 1888.

"Ninety days after date, I promise to pay to the order of myself $499.37, at ——, value received, with interest at —— per cent. per annum until paid.

"[Signed] G. Zunkel."

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And on the back thereof was indorsed: "J. W. McAllister." It was transferred by delivery to one Benjamin. The plaintiff's testimony tended to show that he was an innocent purchaser for value, and the trial court rendered judgment in his favor. Defendant's position is that as he was the maker of the note, payable to himself, it did not become an operative negotiable promissory note, for the reason that it was not indorsed by him. It is provided by statute that "Every promissory note for the payment of money to the payee therein named, or order or bearer, and expressed to be for value received, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange." R. S. 1889, sec. 733. It is further provided in section 735: "Such negotiable promissory notes, made payable to the order of the maker thereof, or to the order of a fictitious person shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker, and all persons having knowledge of the fact as if payable to the bearer."

Leaving out of consideration the foregoing statute a note made payable to the maker, or the maker's order, is a nullity until negotiated to a *bona fide* holder. And such negotiation must be by the maker's indorsement. *Smalley v. Wright*, 44 Me. 442; *Dubois v. Mason*, 127 Mass. 37; Tiedeman on Commercial Paper, sec. 20, and note; 1 Randolph on Commercial Paper sec. 153. And when negotiated by indorsement and delivery, such paper became as a note payable to bearer. 1 Daniels on Negotiable Instruments, sec. 130.

The question comes then to a construction of the statutes quoted above. The defendant contends that the word "negotiated," in section 735, means indorsed with the maker's name; while the plaintiff's contention is that an issuing by delivery for circulation, or for a

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consideration, is a negotiation, in the sense of the statute. If the defendant's contention is correct, then it must be apparent that the statute was a useless enactment; for, as above shown, the indorsement of such a note by the maker made it thence on negotiable paper payable to bearer. If indorsed by the maker, it became a note payable to bearer without the aid of a statute. So, to allow the statute any effective force, we ought to hold that the word "negotiated," as thus used does not require an indorsement. The word "negotiable," as used in section 733, when applied to a note payable to order, means, of course, to appoint or order its payment; and that the *manner* of this order or appointment shall be like that of inland bills of exchange, that is, by indorsement. But there is no authority for saying that the word "negotiated," used in section 735, means indorsement only; it means delivery as well. Anderson's Dictionary of Law; Rapalje's Law Dictionary. And when applied to a note made payable to the maker's own order, it necessarily means something else than indorsement, as a man cannot very well order himself to pay to himself. The statutory sense of the word is fully met if the note be delivered by the maker for a consideration, or be put upon the market by him, in any case where, if it had been actually indorsed, it would have had the character of negotiability. *Central Bank v. Lange*, 1 Bosw. 202.

There is very little assistance to be had in the solution of this case by an examination of authorities in jurisdiction which have not a statute corresponding to our section 735. The state of New York has a statute of which ours is, apparently, a reproduction, and we find the views we have expressed supported by the courts of that state, where it is said that: "The statute was made for the purpose of obviating a difficulty in the way of the holder in making title and suing on

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a note which had not been indorsed by the person to whose order it was made payable. It applies to cases where the maker, who is also payee, negotiates the note *without indorsement.*" *Plets v. Johnson*, 3 Hill, 112. To the same effect are the cases of *Irving Nat. Bank v. Alley*, 79 N. Y. 536, and *Central Bank v. Lange*, *supra*.

The circuit court having, in our opinion, given a correct interpretation to the statutes herein referred to we affirm the judgment. All concur.

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G. A. HOHSTADT, Assignee of WILLIAM BILLUPS, Respondent, v. ROBERT E. DAGGS, Appellant.

St. Louis Court of Appeals, April 5, 1892.

Practice, Appellate: REQUISITES OF ABSTRACT. In order that an appellant, who has filed an abstract of the record in lieu of a transcript, should be in a position to complain of matters of exception as distinguished from matter appearing from the record proper, his abstract must affirmatively show that an exception was taken and duly preserved to the ruling complained of. It must, therefore, show affirmatively that the bill of exceptions was properly filed, and should also contain the motion for new trial or in arrest of judgment, the date of the filing of the same, and the action of the court thereon.

Appeal from the Scotland Circuit Court.—HON. BEN. E. TURNER, Judge.

MOTION TO DISMISS APPEAL OVERRULED.

Robert E. Daggs, for appellant.

J. D. Smoot and *N. M. Pettingill*, for respondent.

BIGGS, J.—Section 2253, Revised Statutes, 1889, provides that the appellant or plaintiff in error may, in lieu of a transcript, file in the appellate court a copy

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of the judgment and the order granting the appeal, accompanied by an abstract of the record. That portion of the section authorizing this reads: "Or, in lieu of such transcript, a certified copy of the record entry of the judgment, order or decree appealed from in said cause, showing the term and day of the term, month and year upon which the same shall have been rendered, together with the order granting the appeal, and shall, thereafter, within the time and manner as is now or may hereafter be prescribed by the rules of such appellate court, file *printed abstracts of the entire record of said cause* in the office of the clerk of such appellate court," etc.

The respondent in the case before us has filed a motion to dismiss the appeal for failure to comply with this section, in that the appellant has failed to file such printed abstracts as the law contemplates. The specific objection is that it is not shown that a bill of exception was filed, or that there *was* a bill of exceptions in the cause. Under the assignment presented in the appellant's brief, which pertains to matters of exception only, the omission is a fatal one. The abstract in such a case should not only contain the record evidence of the filing of the bill, but if the bill be filed out of term, it should also contain a copy of the order of court granting leave to file it in vacation. But, in view of the fact that the statute creates a new mode of practice, and it has never, so far as we are advised, received a judicial construction, we are not disposed to inflict on the appellant so severe a penalty as the dismissal of his appeal. We will overrule the motion to dismiss, but will require the appellant to file, at his own cost, additional abstracts within ten days from this date.

We think it proper in this opinion to indicate briefly, and in a general way, what in our opinion such abstracts should contain. If the questions relied on for

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reversal are matters of error, as contradistinguished from matters of exception, then the appellant need only print the record proper, or so much as may be necessary to a complete understanding of the questions presented for judicial determination. If the assignments pertain to matters of exception also, or to matter of exception only, then the abstract must show affirmatively that the bill of exceptions was properly filed. It should also contain the motion for a new trial or in arrest of judgment, the date of the filing and the action of the court thereon. These are jurisdictional matters and determine the right of the appellate court to pass on matters of exception merely, which can only be brought to the attention of such court by being incorporated in a bill of exceptions which has been properly signed and filed. There may also be matters of special exception which require the observance of certain formalities in order to justify an appellate court to review them. For instance the appellant may complain, as the appellant does in the present case, of improper conduct or remarks in argument of the opposite counsel. To entitle a party to a review of the court's action in the premises, the bill of exceptions must show that the conduct of the opposing attorney was objected to at the time, what was said or done both by court and counsel, and that the appellant excepted to the court's action and preserved the exception in the motion for a new trial. An abstract should show these facts. In no other way can an appellate court be advised of its right to review such a question. All the judges concur.

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JOHN W. STURGEON, Appellant, v. ALFRED P. MERRITT, Respondent.

St. Louis Court of Appeals, April 5, 1892.

Stallions: CONSTRUCTION AND EFFECT OF CONTRACT FOR SERVICES. The statute in regard to the publication of the terms for the service of a stallion (R. S. 1889, sec. 6732) does not invalidate a contract fixing the amount of the charges for such services; it applies only in the absence of a special agreement in relation to the amount of such charges. A contract of that character is construed in this cause.

Appeal from the Montgomery Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED.

Barker & Shackelford, for appellant.

Sol. Hughlett, for respondent.

BIGGS, J.—The plaintiff sues the defendant for the services of a stallion. The action originated before a justice of the peace, where the plaintiff had judgment, but on appeal to the circuit court he was defeated in the action. He brings the case to this court by appeal, and insists that the judgment must be reversed by reason of errors in the court's instructions.

It is admitted that the plaintiff's stallion in the spring of 1890 served a mare belonging to the defendant. The advertised terms for the horse were: "$10 to insure a mare with foal, money due when the fact is ascertained, or mare parted with or moved out of the immediate neighborhood; $12 to insure a colt to stand and suck, money due when the colt stands and sucks, or when the mare is moved or parted with." The

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plaintiff's testimony tended to prove that the contract with the defendant in respect of his mare was under the last clause; and that, about three or four months after the mare was bred, defendant sold her to one White. The defendant's evidence tended to prove that he had a special contract with the plaintiff, by which the money was not to be due and payable until the colt was foaled, and then only in case it stood up and sucked; that in August, after the breeding season was over, it became evident that the mare was not in foal, and that he (defendant) sold the mare to White and the plaintiff, who were partners in the purchase of horses, and that he notified the plaintiff at the time of the sale that the mare was not in foal. The defendant also introduced evidence strongly tending to prove that the mare was not in foal. All this evidence was admitted without objection.

Upon this proof the court instructed the jury as follows: "1. The court instructs the jury that in this case the burden of proof rests upon the plaintiff to show, to the reasonable satisfaction of the jury from the weight of the evidence, that defendant agreed to pay plaintiff the sum of $12 for the service of plaintiff's horse to the defendant's mare, to be due when the colt should stand and suck, or defendant should part with the mare or permit her to be moved permanently out of the immediate neighborhood; and that plaintiff's horse served the mare, and *that, before it could be certainly known whether the mare was with foal or not, the defendant without the consent of plaintiff sold said mare;* and, if such facts be so proved, the verdict will be for the plaintiff for the sum of $12, with six-per-cent. interest thereon from the twenty-second day of November, 1890, up to this date; but, on the other hand, if the defendant has not by the weight of evidence proved the facts

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as above stated, or if the jury believe from the evidence that the contract between plaintiff and defendant was that defendant was to pay for the service of the horse only in event that the mare should become with foal, and that the foal should be delivered and stand up and suck, and that the mare did not become with foal by the said horse, then the verdict will be for the defendant.

"2. The court further instructs the jury that, if they believe there was no special contract (and the burden of showing this rests upon the defendant), made by the parties in regard to breeding said mare, then the printed notice of plaintiff stating the terms upon which he would stand the horse, as read in evidence, must be considered by the jury as the contract between the plaintiff and defendant in regard to the service of plaintiff's horse to defendant's mare."

The plaintiff's first objection is directed against that part of the first instruction in italics. Under the plaintiff's idea of the contract the defendant, by selling the mare before the expiration of the time for the delivery of a foal, made himself liable for the season of the mare, whether she was in foal or not. This is a strained and unreasonable construction. We think that the court's view was a proper one. After it became reasonably certain that the animal was not in foal, the defendant had a right to sell her without incurring an absolute liability under the contract.

Objection is made to the latter portion of the first instruction, and also to the second instruction, upon the theory that there could be no contract different from the advertised terms. This position is supposed to find support in the following section of the statute:

"Sec. 6732. *Owner to advertise terms—publication imparts notice.* The owner or keeper of any stallion, jack or bull may advertise the terms upon which he will let

any such animal to service, by publication thereof in some newspaper of the county where such animal is kept, for sixty days during the season of each year, or by printed handbills conspicuously posted during such period, in four or more public places in said county, including the place where such animal is kept; and publication or posting as aforesaid of the terms of such service shall impart notice thereof to the owner of any female animal served by such stallion, jack or bull during any such season; and, in all actions and controversies in respect to the foal or other product of such service, the owner of such female animal so served shall be deemed to have accepted and assented to said terms, when so advertised and published or posted as provided herein."

The object and meaning of the foregoing section are misconceived by the plaintiff's counsel. The legislature only intended to make the advertised terms conclusive between the parties in the absence of a special agreement to the contrary. It was not intended to take away or abridge the right to make a different contract.

Finding no error in the record, the judgment of the circuit court will be affirmed. All the judges concur.

WILSON CRAMER, Respondent, v. BENTON AKIN, Appellant. 49 163 / 81 374

St. Louis Court of Appeals, April 5, 1892.

Practice, Appellate: FILING OF BILL OF EXCEPTIONS OUT OF TIME When a bill of exceptions is filed out of time, this court can only review rulings which appear from the record proper, and, in the absence of error in a ruling so appearing, must affirm the judgment appealed from.

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Appeal from the Mississippi Circuit Court.—Hon. H. C. O'Bryan, Judge.

Affirmed.

R. M. Darnell and *Boone & Elliott*, for appellant.

Wilson Cramer, for respondent.

Biggs, J.—The respondent makes the point in his brief, that the bill of exceptions in this cause was filed out of time. The record shows that the motion for new trial was overruled on October 14, 1891, and that on that day leave was given the appellant to file bill of exceptions sixty days from that date. At the adjourned session of the same term, to-wit, December 11, 1891, the time for filing the bill was extended to December 27, 1891. No further extension is shown by the record. The bill was filed on the twenty-fifth day of January, 1892.

The errors assigned by the appellant pertain to matters of exception only, which could only be brought to our attention by a bill of exceptions filed within the time prescribed by order of court. As we are precluded from treating the bill of exceptions as a part of the record, and as the record proper is in no way challenged, the judgment of the circuit court must be affirmed. All of the judges concur in the affirmance.

James Roberts, Respondent, v. The Quincy, Omaha & Kansas City Railway Company, Appellant.

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St. Louis Court of Appeals, April 5, 1892.

Railroads: statutory action for injury to stock: instructions. An instruction in a statutory action against a railway company for double damages for the killing of stock, which authorizes a recovery without a finding that the stock came upon the railway tracks at a

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point where the statute required the company to fence its right of way, is erroneous; and the error is prejudicial when, under the evidence, it is uncertain whether the stock came upon the tracks at such a point.

Appeal from the Lewis Circuit Court.—HON. BEN. E. TURNER, Judge.

REVERSED AND REMANDED.

Jno. P. Butler, for appellant.

Blair & Marchand, for respondent.

BIGGS, J.—This is the second appeal in this case. The opinion on the first appeal (*Roberts v. Railroad*, 43 Mo. App. 287) contains a full statement of the subject-matter of the litigation, which enables us to abbreviate the statement in this opinion. The first count in the petition, under which a recovery was had, is for double damages under section 2611, Revised Statutes, 1889. It was alleged that two mares and a colt, the property of the plaintiff, came upon the defendant's railroad track where the same passed through inclosed lands, and that the animals were there struck and killed by an engine on the defendant's road. There was also an averment, that the road was not fenced at the point where the horses came upon the track. The plaintiff lived on what is known as the Larue farm, which is separated from the Nunn farm on the west by a traveled road running north and south. The general course of the railroad through these farms is east and west. To the north of the railroad both Larue and Nunn had built fences, thereby forming a lane along which the traveled road extended. At the point where the railroad crossed this road, the defendant had constructed a crossing and cattle-guards on each side. That the horses were killed by an engine or cars on the

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defendant's railroad, and that they were found dead on the right of way inside of Nunn's inclosure, just south of the cattle-guard on the north side of the crossing, is not disputed. But where the animals came upon the track, and where they were struck, is under the evidence a matter of serious controversy. The first trial was had, as we understood it, on the theory that the animals came upon the track at the crossing, and were there struck by the engine and carried over the cattle-guard into Nunn's field. That judgment was sought to be upheld upon the ground, that the road between the two farms was only a passway or farm crossing, and that, as it was closed by gates at each end, the land occupied by it, so far as the defendant's duty to fence was concerned, must be regarded as inclosed lands. The uncontradicted evidence showed that the road had been traveled by the public for twenty years, and was so traveled at the time the railroad was constructed. We decided that this road was a *de facto* highway, and that the defendant was under no obligation to fence it.

On the last trial the plaintiff's evidence tended to prove that he turned the animals into his field north of the railroad and adjacent to the Nunn farm, and that he saw nothing more of them until the afternoon, when he found them dead on the railroad right of way. No witness saw the animals killed. Neither was there any direct testimony at what point they came upon the track. The plaintiff recovered the full value of all the animals, but on intimation on motion for new trial, that in the opinion of the court there was no substantial evidence that one of the mares and the colt came on the railroad through Nunn's farm, the plaintiff remitted from the verdict their value as shown by the evidence, and the court entered a judgment for double the value of the other mare. The defendant has appealed.

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If the judgment in this case is to be upheld, it must be done upon the ground that the animal, for which there was a final recovery, escaped into Nunn's field at some point along the highway where Nunn's fence was not a lawful fence, and passed from there onto the defendant's railroad, where it was struck and killed. If there was substantial evidence of this (which the defendant challenged by its demurrer to the evidence), and no prejudicial error intervened at the trial, the judgment will have to be affirmed.

The plaintiff testified that all three of the animals were found inside of Nunn's field, just west of the cattle-guard; that one of the mares was found about eight feet from the cattle-guard; the colt about sixteen feet, and the other mare between ninety and one hundred feet. The plaintiff also testified that the latter animal was shod, and that he found her tracks along the railroad between where she was found and the cattle-guard; and that he searched for the tracks of the others, and could not find them. It is conceded that there was no railroad fence through Nunn's land, and there was evidence that Nunn's fence along the lane north of the railroad was not a lawful fence; that there were gaps in it. It is very evident that the mare either came down the lane and was struck at the crossing, or she went into Nunn's field and from thence passed onto the railroad track. If the plaintiff's statement in reference to the tracks is to be believed, the reasonable conclusion would be that the animal came upon the track on the inside of the inclosure. It would seem to have been physically impossible for her to have regained her feet after being carried over the cattle-guard on the cow-catcher. The credibility of this witness was for the jury. If his statement was believed, it furnished evidence of the defendant's liability.

This brings us to the instructions. The plaintiff

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asked, and the court gave, the following instruction: "The court instructs the jury that, if they shall believe from the evidence in the cause that the mares and colt of the plaintiff were killed by the engine and cars of the defendant on February 15, 1889, then and there being run and managed by the defendant's servants and employes, at a point or place on said road where the same ran through inclosed lands or fields, and shall further believe that, at the place where said mares and colt got on said defendant's railroad track, the defendant had failed to erect fences along the line of its said road, and was killed by said defendant's engine and cars being run as aforesaid, by reason of such failure to so fence its said road as aforesaid, then the jury should find for the plaintiff, and assess his damages in such sum as the evidence shall show said mares and colt to have been worth at the time they were killed." It will be observed that this instruction failed to tell the jury that the defendant was not liable for killing the animals, unless it was found by the jury that they came upon the track through Nunn's field. This omission was fatal, and it has been so held by all the courts in the state. *Moore v. Railroad*, 81 Mo. 499, 503; *Foster v. Railroad*, 90 Mo. 116; *Nance v. Railroad*, 79 Mo. 196; *Wilson v. Railroad*, 18 Mo. App. 258; *Ehret v. Railroad*, 20 Mo. App. 251; *Vaughn v. Railroad*, 34 Mo. App. 141; *Henson v. Railroad*, 34 Mo. App. 636. In the *Vaughn case* we declined to reverse the judgment for a like defect in the instructions, for the reason that the only legitimate inference which could be drawn from the evidence was that the animal came onto the track at a point where the defendant ought, and had failed, to fence. In the case at bar the plaintiff, as to the horse tracks found by him on the inside of the field, which is the strong and controlling circumstance in his favor, was strongly contradicted by his own testimony

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on the former trial, which was to the effect that he saw the tracks of the horses in the lane, and said nothing about seeing the tracks of the mare inside of the field. Hence, we conclude that the error in the instruction was prejudicial to the defendant, and must result in a reversal of the judgment.

The evidence, as preserved in this record, is insufficient to establish any liability as to two of the animals. It is quite clear that they came upon the track at the crossing of the highway, and, in order to hold defendant for them, some act of negligence on the part of the persons running the train must have been established. On another trial (unless there are other new developments in the evidence) the recovery should be confined to the animal here in controversy. The jurors should be instructed that to entitle the plaintiff to a judgment they must find that the mare escaped into Nunn's inclosure through a defective fence along the public highway, and from there passed onto the railroad track where she was struck and killed, and that she did not come upon the railroad track at the public crossing, or did not break through Nunn's fence at the cattle-guard of which there was some evidence.

Whether the defendant was under obligation to fence its road where it extended across the traveled road, is no longer a question in the case. We decided that no such obligation existed, and that must be the law of the case. We make this suggestion in view of the fact that the bulk of the evidence in the present record was directed to that question, all of which was irrelevant.

With the concurrence of the other judges, the judgment of the circuit court will be reversed, and the cause remanded. It will be so ordered.

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Caleb T. Pinnell, Respondent, v. The St. Louis, Arkansas & Texas Railway Company, Appellant.

St. Louis Court of Appeals, April 5, 1892.

1. **Practice, Appellate:** non-prejudicial error. The refusal of the trial court to require the plaintiff to elect between two causes of action, even when erroneous, is not prejudicial, when that court limits him to the proof of one of the causes.

2. **Action for Killing of Stock by Railway Train:** contributory negligence. Contributory negligence, debarring the plaintiff's right of recovery, exists only where the negligence of plaintiff contributed proximately to the injury sued for; it does not exist where the injury sued for and that resulting from the fault of the plaintiff are disconnected.

3. ———: sufficiency of evidence as to damages. The evidence is considered, and is *held* to have been sufficiently definite in regard to the *quantum* of the damages to warrant the verdict for the plaintiff.

Appeal from the Mississippi Circuit Court.—Hon. H. C. O'Bryan, Judge.

Affirmed.

H. N. Phillips and *C. L. Keaton*, for appellant.

H. C. Riley, *Wilson Cramer* and *R. B. Oliver*, for respondent.

Biggs, J.—The pleadings and proof in this case show that the defendant's railroad is constructed through a certain farm in New Madrid county, which the plaintiff occupied as a tenant during the fall of 1887 and the year 1888. There was an inclosure of one hundred and twenty-two acres, all of which the plaintiff had sown in wheat. There was a traveled road extending along the north side of this wheat field. The railroad extended across this highway into the inclosure.

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The plaintiff's action was brought for double damages under section 2611 of the Revised Statutes of 1889. The petition in substance alleged that the cattle-guard at the point where the railroad passed over the highway into the plaintiff's wheat field was insufficient, and that by reason of this, and the failure of the defendant to erect fences along the sides of its roadbed, where it passed through the field, hogs came over the railroad at the cattle-guard, and thence into the plaintiff's wheat. It was claimed that the hogs, thus escaping from the highway onto the premises, damaged the wheat crop in the sum of $800. The answer was a general denial. The jury returned a verdict for $800, which the court doubled. The defendant has appealed.

The petition, after stating the damage to the crop, contained the following clause: "That by reason of said hogs being in said field, and his effort to save said wheat field from said hogs, he has been bound to expend in timber and labor and feed the sum of $200," making the total damage claimed $1,000.

The defendant insisted that, by reason of this averment, two separate causes of action were stated in one count, and through its counsel moved the circuit court to require the plaintiff to elect upon which of the two causes of actions he would proceed to trial. The motion was overruled, and that action of the court is assigned for error. Conceding this ruling of the court to be error, the defendant was in no way prejudiced by it, because the plaintiff was not permitted to give any evidence of damages other than those arising from the destruction of the crops, and the court by its instructions expressly confined the jury, in the assessment of damages, to the injuries done to the wheat. The plaintiff testified without objection that his hired hand spent a good deal of his time in driving the hogs from the field and in trying to keep them out, but the only effect

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and object of the evidence was to show that the plaintiff had not been entirely passive, but, on the contrary, had made reasonable efforts to protect himself against the defendant's alleged negligence, after the defendant upon notice had failed to repair the cattle-guard.

It is urged by the defendant's counsel that a question of contributory negligence is in this case, and that the court committed error in refusing its instructions on that theory of the testimony. This complaint constitutes the defendant's second assignment of error. There was evidence tending to prove that the fence on the east side of the wheat field was somewhat out of repair, and that two or three times during the spring hogs were known to get into the wheat field through this fence. It is supposed by the defendant's counsel that this evidence tended to prove that the plaintiff was guilty of contributory negligence in respect of the injuries alleged to have occurred through the defendant's negligence. We have been at a loss to know how this theory can be worked out on principle. The general rule is that the defendant will be excused from liability for a negligent act, when it affirmatively appears that the fault of the plaintiff *proximately* contributed to the injury; that is, notwithstanding the negligence of the defendant, the injury would not have happened but for the concurrent negligence of the plaintiff. Applying this rule to the case in hand we are unable to see what connection there could possibly have been between the failure of the plaintiff to keep the east fence in repair and the damage resulting from the failure of defendant to comply with its statutory duty. *Biggerstaff v. Railroad*, 60 Mo. 567. The evidence in reference to the bad condition of the east fence was only admissible for the purpose of showing that the entire damage complained of, or a portion of it, was caused by hogs which came upon the land through the

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east fence, and not with the view of defeating the action on the ground of contributory negligence. We will have to rule this assignment against the defendant.

Lastly, the defendant claims that the verdict is excessive. The plaintiff's evidence tended to prove that the value of the wheat destroyed was from $800 to $1,200; that it was destroyed by hogs, and that they got into the field over the cattle-guard which had been allowed to fill up so that hogs could pass over it. There was evidence to the effect, that some hogs broke through the east fence two or three times and destroyed an acre or more of wheat. In addition to the plaintiff's instructions, concerning which there is no complaint, the defendant asked and the court gave the following: "The court instructs the jury that plaintiff can recover for such damage only as you find from the evidence was occasioned by hogs coming into the field in question through the defendant's defective cattle-guards; and, if you find from the evidence that hogs got into said field through plaintiff's own fence or gaps therein, you will allow plaintiff, if you find for him at all, only such damages as were caused by the hogs that entered the field in question through the defendant's defective cattle-guard; and the burden of proving the damage thus done, and the defects in the cattle-guards, and failure of defendant to erect fences along the side of its road, devolves upon the plaintiff." It is claimed by the defendant's counsel that this instruction was not given as asked, but was modified by the court. The record does not bear out this statement. It shows that the defendant asked, and the court gave, the instruction. Under this instruction and the evidence the defendant's counsel argues not only that the verdict is excessive, but also that, as the evidence failed to separate or designate in anything like a definite way the injuries committed by either lot of hogs, the plaintiff must fail in his action

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entirely. The evidence placed the entire damage as high as $1,200, The verdict was for $800. The difference would be ample to cover all damage done by the hogs which came into the field through the plaintiff's fence. This places the verdict within the scope of the evidence which precludes us from deciding the amount to be excessive. Now it is true that the evidence failed to fix in a definite way the amount of damage done by either lot of hogs, but the plaintiff's evidence did tend to show that the great bulk of the damage resulted from the defendant's failure to comply with the statutory requirement.

In view of the fact that the damage done by the hogs getting through the plaintiff's fence was quite small, when compared with the damage done by the others, and the further fact that the defendant failed entirely to construct a fence along the sides of its road, we think that the defendant is in no condition to split hairs over such a question. The testimony was as satisfactory and definite as could reasonably have been expected. We will, therefore, rule this assignment likewise against the defendant.

Finding no error in the record the judgment of the circuit court will be affirmed. All the judges concur.

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WILLIAM MCKEE, Respondent, v. THE ST. LOUIS, KEOKUK & NORTHWESTERN RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, April 5, 1892.

1. **Obstruction of Watercourses:** RIGHT OF ACTION OF A SUBSEQUENTLY INCOMING TENANT. If a watercourse is wrongfully obstructed by the building of a permanent embankment (in this cause this was done by a railway company in the construction of its road), a tenant

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of adjacent land, though he rents the land after the erection of the embankment and with knowledge thereof, can recover from the wrongdoer the damages to his crops from overflows caused by such obstruction.

2. ———: FORMER RECOVERY. When several annual crops are destroyed by different overflows, thus occasioned, the tenant may sue for the injury to each crop as it occurs, and, therefore, a former suit will be no bar to a recovery in another action for damages suffered subsequently to the institution of the first suit.

3. ———: MEASURE OF DAMAGES. The damages recoverable by the tenant in such an action consist of the injury done to the crop sued for. Where a tenant is not prevented by such an overflow from cultivating the land held by him, he is not entitled to the depreciation in the rental value of the land in consequence of such obstruction.

4. **Damages**: INSTRUCTIONS. An instruction in such an action, which directs the jury to assess the plaintiff's damages at such sum as they may believe he is entitled to under the evidence, is erroneous.

Appeal from the Louisiana Court of Common Pleas.
HON. E. M. HUGHES, Judge.

REVERSED AND REMANDED.

Jno. W. Matson, for appellant.

(1) Defendant's objections to the introduction of any testimony under the petition should have been sustained. It is not alleged that the culverts were carelessly, or negligently, filled up. *Abbott v. Railroad*, 83 Mo. 278; *Johnson v. Railroad*, 35 N. H. 369; *Waterman v. Railroad*, 30 Vt. 610. And when the culverts were filled they constituted part of the railroad bed and made a permanent embankment, or structure, and as this was done prior to plaintiff's tenancy the right of action for the same cannot be sustained by plaintiff. Dicey on Parties, 382; *Baldwin v. Calkins*, 10 Wend. 167; *Artwin v. Mayor of Baltimore*, 16 Md. 387; *McLeod v. Lee*, 17 Mo. 103; *Railroad v. Maher*, 91 Ill. 312; *Ellis v. State*, 7 Blackf. 534; *Rex v. Cross*, 2 Car. & P. 483; Thompson on Trials,

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sec. 1921, p. 1401; *McKinley v. Railroad*, 40 Mo. App. 456. The erection of the embankment constituted a permanent structure. Gould on Waterways [2 Ed.] sec. 416, p. 687, and cases cited in notes 1 and 2. There can only be one recovery in such cases, and that by the owner or person in possession at the time of the original erection of the embankment. Gould on Waterways [2 Ed.] secs. 417, 418, pp. 688, 689; *Powers v. Council Bluffs*, 45 Iowa, 652; *Stodghill v. Railroad*, 53 Iowa, 341; *Railroad v. Loeb*, 118 Ill. 203; 1 Sedgwick on Damages [8 Ed.] sec. 95; 5 American & English Encyclopedia of Law, 20. Under allegations in petition plaintiff was a tenant from year to year (34 Mo. 420), and, therefore, the claim of damages for failure to sublet is not tenable, not having written permission from landlord (R. S. 1889, sec. 6368); and the cause of the alleged damages also existed at the time. *McKinley v. Railroad, supra.* The petition shows plaintiff knew of the stopping up of the culverts and the consequences of the same at the time of his leasing, and, therefore, cannot recover. *Railroad v. Hunter*, 50 Ill. 325; *Railroad v. Allen*, 38 Ill. 205; Gould on Waterways [2 Ed.] sec. 368, p. 664; *Railroad v. Maher*, 91 Ill. 312. The loss of rents occasioned by a nuisance is special damages, and cannot be recovered unless specially alleged and proved. *Parker v. Lowell*, 11 Gray, 358; *Plimpton v. Gardiner*, 64 Me. 360; *Rutter v. Fremont*, 47 Cal. 165. (2) The plea of *res adjudicata* was a good one, and the court erred in refusing to permit defendant to introduce testimony of the former recovery. *Troy v. Railroad*, 3 Foster, 83; *Powers v. Council Bluffs*, 45 Iowa, 651; *Maher v. Railroad*, 91 Ill. 312; *James v. City*, 83 Mo. 567; *Railroad v. McFarland*, 43 N. J. Law, 605; *Staple v. Spring*, 10 Mass. 72; *Stodghill v. Railroad*, 53 Iowa, 341; *Railroad v. Mihlman*, 17 Kan. 224; *Bird v. Railroad*, 30 Mo. App. 378.

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Fagg & Ball, for respondent.

Under the pleadings and the evidence the respondent was clearly entitled to a verdict. *Jones v. Railroad*, 84 Mo. 151; *Rychlicki v. City of St. Louis*, 98 Mo. 497; *Moss v. Railroad*, 85 Mo. 86; *Bird v. Railroad*, 30 Mo. App. 365; *Railroad v. Schneider*, 30 Mo. App. 626; *Culver v. Railroad*, 38 Mo. App. 130; *Autenrieth v. Railroad*, 36 Mo. App. 254; *Van Hoozier v. Railroad*, 76 Mo. 145; *Dickson v. Railroad*, 71 Mo. 575; *Rensan v. Railroad*, 78 Mo. 512. "Where the wrong done does not involve the entire destruction of the estate or its beneficial use, but may be apportioned from time to time, separate actions must be brought to recover the damages so sustained, and a former suit will be no bar to a recovery on another action for damages suffered subsequent to the institution of the first suit," and the party injured may bring the suit whether landlord or tenant. *Van Hoozier v. Railroad*, 70 Mo. 145; *Autenrieth v. Railroad*, 36 Mo. App. 263; *The Town of Troy v. Railroad*, 3 Foster, 83; *Turnpike Co. v. Stephens*, 13 N. H. 28; *Pinney v. Berry*, 61 Mo. 367.

Biggs, J.—The defendant's railroad is constructed north and south along the Mississippi river bottom, the hill lands lying immediately to the west, and to the east the low lands extending to the river. At the place where the railroad passed along or near to the eastern edge of land occupied by the plaintiff, two branches extended from the hill lands on the west in an easterly direction across the strip of land upon which the railroad was constructed. In the original construction of the road culverts were built, through which the waters of the branches escaped and flowed eastwardly through their accustomed channels. In May, 1889, the defendant, claiming that it was necessary for the proper

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improvement of its roadbed, closed up the two culverts with solid embankments, and undertook to divert the waters of the two branches to another branch by means of an artificial ditch, extending south along the west side of the railroad track. The plaintiff occupied the land as a tenant for the year 1890. He instituted this action in the Louisiana court of common pleas, alleging in his petition that the branches were watercourses; that the defendant had obstructed them; that by reason of the obstructions the land occupied by him as a tenant had been flooded during the months of April, May, June and July, 1890, and that, by reason of the premises, "he had been unable to cultivate, use and raise crops on said land, or to rent, lease or collect rents thereon, or derive any benefit or income from the same during said year 1890," etc. The defendant's answer was, *first*, a general denial; *second*, that, at the time the plaintiff leased the land, he knew of the embankment, and that it was a permanent structure; *third*, plea of former recovery. The jury returned a verdict in plaintiff's favor for $75, $15 of which were voluntarily remitted, and a judgment was entered by the court for the remainder. The defendant has appealed, and assigned many errors. As we have concluded that the judgment cannot be upheld, we will only discuss such assignments as may be necessary to make clear our ideas of the legal aspects in the case, and the manner in which it ought to be retried.

I. In the first place the defendant's counsel argues that no right of recovery can exist in the plaintiff, because the embankments had been made prior to the renting of the land by him, and that the obstructions complained of were necessarily permanent, of all of which the plaintiff was fully advised, as appears from both his petition and his evidence. Therefore, it is insisted that the circuit court committed error in per-

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mitting the plaintiff to introduce any evidence at all, or at least in refusing to sustain the defendant's demurrer to the evidence. This argument seems to have for its foundation the idea that, as the obstructions to the watercourses (if it could be claimed that the branches were watercourses) were necessarily permanent, and as they were erected long prior to the plaintiff's occupation or right of occupation under his contract of renting, and as he acted with full knowledge of the situation, he is without a remedy for the damage sued for. This position is sought to be supported upon the theory, that the resulting damage (whether present or prospective) to the land in question was, by reason of the permanent character of the obstruction, original and complete, and that the right to recover the same vested immediately in the owner upon the completion of the obstructions. The legal proposition last stated cannot be invoked, and is not applicable to what may be called overflow cases; that is, where lands have been flooded by reason of the obstruction or diversion of a watercourse.

In most cases the rule is as stated; that is, that damages caused to land by a permanent nuisance must be sued for by the owner in one action, because the entire damage has been suffered, and it is capable of being definitely ascertained. This principle is of easy application where the owner of a servient estate, situate on a watercourse, has been deprived of the use of the water by a permanent obstruction or diversion of the stream by a dominant proprietor. In such case, the diversion of the water is a fixed fact, and is in nowise contingent, thereby rendering the resulting damage certain and complete. In such a case the entire damage must be sued for by the owner in one action, unless the property is under a prior lease, in which event, both owner and tenant could sue; the former

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for injuries to the freehold, the latter for injuries to the possession during the continuation of the lease. The case of *Stodghill v. Railroad*, 53 Iowa 341, upon which the defendant relies, is such a case. In such a case it is quite clear to us that an incoming tenant could not complain of the continuation of the nuisance, because the right to recover the entire damages to the land is vested in the owner, which would necessarily deprive the tenant of a right to sue. The law would presume that the inconvenience to which such a tenant would be subjected from a loss of the water was considered in making the contract for rent.

But is this true in a case like we have here? We think not. The case of *Van Hoozier v. Railroad*, 70 Mo. 145, was an overflow case. The plaintiff in that case claimed that the defendant, in constructing its road, diverted a stream of running water, whereby portions of the plaintiff's land were flooded in the year 1875, and the crops growing thereon destroyed. The defendant pleaded in bar to the action a former recovery for the destruction of the plaintiff's crops on the same land for the years 1873 and 1874. The court held the plea not good. It said: "In cases of nuisance the rule is well settled that the plaintiff cannot recover for injuries not sustained when action is commenced. It is equally well settled that, where the injury inflicted is of a permanent character, and goes to the entire value of the estate, the whole injury is suffered at once, and a recovery should be had, therefore, in a single suit; and no subsequent action can be maintained for the continuance of such injury. But where the wrong done does not involve the entire destruction of the estate, or its beneficial use, but may be apportioned from time to time, separate actions must be brought to recover the damages so sustained, and former suits will be no bar to a recovery in another action for damages suffered

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subsequent to the institution of the first suit." Applying this law to the case, the court said: "Portions of these lands were annually cultivated after the nuisance was levied, and the crops thereon annually injured, so that it is patent that the injury thereby inflicted did not go to the entire value of the estate, but was of yearly occurrence, and varied in extent with the volume of water discharged upon the land. Such being the facts, it is plain that the injury is a continuous one, susceptible of periodical apportionment, and, therefore, capable of being redressed by successive actions."

In *Dickson v. Railroad*, 71 Mo. 575–579, it was said: "In this case the nuisance complained of is the act of defendant in changing the channel of a running stream on his own land, and thereby so directing it as to overflow the adjacent land of plaintiff, thus destroying his crops for the years 1874 and 1875. Until after the injury occurred, no right of action existed in plaintiff, and his damages could only be measured after the injury was inflicted." The rule, as thus established, is that, where the injuries sustained by reason of the continuation of a nuisance consist in the destruction of crops from year to year, the plaintiff will not be limited in his actions, but may sue as often as damage may occur. The foundation of this rule is, that future damages in such cases are speculative, and successive actions therefor are maintained on the theory that the continuation of the nuisance is, in the eye of the law, equivalent to the erection of a fresh one for each day of the continuation, and, therefore, each successive action is deemed to be predicated upon a new wrong. Gould on Waters, sec. 387.

Hence, any subsequent occupant of the land, whether tenant, purchaser, heir or devisee, may maintain such actions. Angell on Watercourses, sec. 399. As to such persons, the continuation of the nuisance,

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after the intervention of their rights, must be regarded as the erection of a new nuisance, and their actions for resulting damage are in respect of new wrongs. Therefore, we conclude that the plaintiff in the present case has a right of action for damages resulting to him as a tenant by reason of the alleged obstruction of the watercourses. In the case of *Van Hoozier v. Railroad, supra*, the supreme court has tacitly recognized the right of an incoming tenant to maintain such an action. There the land was let for a part of the crop. The landlord alone sued. Objection was made that the tenant ought to have been made a party, as he and plaintiff were tenants in common of the crops which were alleged to have been destroyed. The court answered the objection in this way: "The petition alleges the partial destruction of the crops, and, so far as its allegations are concerned, the plaintiff appears to be the sole owner; but, as it appears from the testimony that the land was leased on such terms as made the plaintiff and his tenant tenants in common of the crop until it was divided (*Johnson v. Hoffman*, 53 Mo. 504), and as no objection was, at any time, taken to the non-joinder of the tenant as a party plaintiff, the present plaintiff was entitled to have his damages apportioned at the trial."

II. In plaintiff's first instruction the court declares the measure of damage to be the fair rental value of so much of the land as was flooded during the year 1890. The second instruction concluded in this way: "And assess his (plaintiff's) damages at such a sum, not exceeding the amount claimed in his petition, as they shall believe from the evidence in the cause plaintiff *is entitled to.*" Both instructions are wrong. The error in the latter is obvious and needs no discussion. The first is wrong, because the plaintiff, who was a tenant for a year *only*, had nothing to do with the rental value of the land, and it was something entirely foreign to

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the cause, unless he had paid cash rent, and was unable to cultivate the ground by reason of the accumulated water. But no such case is presented by the record. The evidence is that he occupied the land under a verbal lease presumptively with no right to sublet. The plaintiff's own testimony tended to show that fifteen or twenty acres of growing corn were destroyed. The instruction should have confined the damages to the value of the crops thus destroyed. On a retrial the plaintiff ought to amend his petition, so as to show the actual injuries suffered, and make his pleading conform to his proof. These instructions also assume that the branches in question were in fact watercourses. This was an issue in the case, and the evidence on the subject was conflicting. Whether the branches were, in fact, watercourses within the meaning of the law, was a question for the jury. The court should have modified this instruction by calling the attention of the jury to the defendant's instructions, which defined watercourses, and required the jury to find that the branches were watercourses, before they could return a verdict for the plaintiff.

III. The plaintiff had possession of the same land in 1889. He sued and recovered from the defendant the value of his crops for that year, which were destroyed by reason of the same nuisance. The defendant insisted that the recovery in that suit was a bar to this. Our discussion on the first proposition shows that this contention is untenable, and this assignment will, therefore, be overruled. There is no question of limitation in this case. *Bird v. Railroad*, 30 Mo. App. 365.

What we have said answers all other objections made in the appellant's brief, and we apprehend that the case can be retried without any further difficulty.

With the concurrence of the other judges, the judgment of the circuit court will be reversed and the cause remanded. So ordered.

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THE STATE OF MISSOURI, Respondent, v. LAWRENCE DALY, Appellant.

St. Louis Court of Appeals, April 5, 1892.

1. **Statutes:** REPEAL BY IMPLICATION. Repeals by implication are not favored. A statute, which does not repeal a prior statute in express terms, is not to be construed as having that effect, unless its provisions are plainly incompatible with those of such prior statute. Especially is this true when the prior statute is special, and the other is general.

2. **Functions of Assistant Prosecuting Attorney of the St. Louis Court of Criminal Correction:** EFFECT OF REVISED STATUTES. *Held*, under this rule that the office and functions of the assistant prosecuting attorney of the St. Louis court of criminal correction have not been abolished by the act of April 12, 1877 (Laws, 1877, p. 354), or the incorporation of the provisions of that act into the Revised Statutes.

3. ——— : PREPARATION OF INFORMATIONS: LODGING OF AFFIDAVIT THEREFOR. *Held*, further, accordingly, that as the duty of preparing informations for criminal proceedings in said St. Louis court of criminal correction is specially committed to said assistant prosecuting attorney by the special statute relating to that court, an affidavit intended to furnish the basis of such an information is properly lodged with that officer.

Appeal from St. Louis Court of Criminal Correction. HON. J. R. CLAIBORNE, Judge.

AFFIRMED.

C. M. Napton, for appellant.

The information is insufficient, as it was not lodged by the proper officer. In *State v. Bennett*, 102 Mo. 369, 370, it was held that the special law relating to the St. Louis court of criminal correction concerning informations had been repealed by the act of April 12, 1877. Acts, 1877, p. 354.

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Bernard Dierkes, Prosecuting Attorney St. Louis Court of Criminal Correction, for respondent.

THOMPSON, J.—The defendant was tried and convicted in the St. Louis court of criminal correction under an information charging him with an attempt to commit petit larceny, as defined in section 3949 of the Revised Statutes. Appealing to this court, he assigns for error that the information was insufficient in that the affidavit was not lodged with the proper officer,—it having been lodged with the assistant prosecuting attorney, and not with the prosecuting attorney. The argument, based on the decision of the supreme court in *State v. Bennett*, 102 Mo. 369, 370, is that the special law relating to the St. Louis court of criminal correction concerning informations has been repealed by the act of April 12, 1877. Laws, 1877, p. 354. The supreme court in that case held that the act of 1877 "was intended to apply, as its first section recites, to all courts having jurisdiction of misdemeanors, and to establish general rules of practice on the subject to which it relates." And the court added: "We deem it applicable even in a forum previously governed by special provisions of law as was the court of criminal correction in St. Louis." The court accordingly held that an information must be *verified* according to the requirements of the general law, and that a verification according to the requirements of the special statute relating to the St. Louis court of criminal correction was not sufficient.

The second section of the act of 1877 requires the person making the affidavit to "file the same with the clerk of the court having jurisdiction of the offense, or deposit it with the *prosecuting attorney*." The same provision is found in section 4058 of the Revised Statutes. By the general statutes, "each prosecuting

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attorney in this state may appoint one assistant prosecuting attorney, who shall possess all the qualifications of a prosecuting attorney, and be subject to all the liabilities and penalties for failure or neglect to discharge his duty to which prosecuting attorneys are now or may hereafter be made liable." R. S., sec. 662. By another provision of the general statutes "the appointment of said assistant prosecuting attorney shall be made in writing and signed by the prosecuting attorney, and they shall take and subscribe to the oath of office required of prosecuting attorneys, which appointment and oath of office shall be filed in the office of the clerk of the circuit court of the county." Sec. 663. And it is further provided: "The assistant prosecuting attorney shall discharge the duties of the prosecuting attorney when the prosecuting attorney is sick or absent from the county, or when the prosecuting attorney is engaged in the discharge of the duties of his office, so that he cannot attend. The assistant prosecuting attorney shall be paid only by the prosecuting attorney, and he may assist the prosecuting attorney at his request in any case: *provided*, that he shall not be disqualified from defending in any case, civil or criminal, except those in which he shall have acted as assistant prosecuting attorney." Sec. 664. The assistant prosecuting attorney thus provided for is merely a sort of deputy of the prosecuting attorney, appointed to act in the cases therein provided, with the liberty to practice even in criminal cases, except in cities having one hundred thousand inhabitants or more, where he is required to devote his entire time to the duties of his office. Sec. 665.

But the assistant prosecuting attorney of the St. Louis court of criminal correction is a different officer from the assistant prosecuting attorneys thus provided for. He is elected by the people, and holds his office

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for a prescribed term. R. S. 1889, sec. 3, p. 2152. He receives a salary of $2,500 per annum, payable monthly by the city of St. Louis. Sec. 8, p. 2153. And it is made his duty to attend at his office, on each secular day of the week, *for the purpose of preparing all complaints, affidavits, informations and pleas,* required by law, to be lodged in said court. Sec. 18, p. 2155. Moreover, an information in the St. Louis court of criminal correction in cases of misdemeanor "may be lodged by the prosecuting attorney for *said court, or by said assistant prosecuting attorney,* or by any other person." Sec. 19.

Repeals by implication are not favored. Statutes, which do not repeal prior statutes in express terms, are not to be construed as having that effect, unless their provisions are plainly incompatible with those of such prior statutes. Especially is this true, where the subsequent statute is a general one, and the prior statute is a special one,—the applicatory legal maxim being *Generalia specialibus non derogant.* On the contrary, if they relate to the same subject, and their provisions are not incompatible with each other, they are to be construed *in pari materia* so far as practicable, with the view of making them harmonious, and parts of a general statutory system. These are truisms in statutory construction.

Applying these principles, and at the same time giving full effect to what the supreme court held in *State v. Bennett, supra,* we must hold that the act of 1877 was not intended to abolish the office or functions of the assistant prosecuting attorney of the St. Louis court of criminal correction; but that, in so far as the general statutes above quoted speak of the prosecuting attorney, the assistant prosecuting attorney of the St. Louis court of criminal correction is included; and that, as the duty of preparing informations is specially

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committed to him by the special statute relating to that court, above quoted, an affidavit intended to furnish the basis for such an information is properly lodged with him, and need not be lodged with the prosecuting attorney. The information was verified in this case by the informer, "according to his best knowledge and belief," and that kind of a verification was held good in *State v. Bennett, supra.* In fact *State v. Bennett* is an authority for holding the information in this case good, because the information in that case was drawn, sworn to and lodged with the assistant prosecuting attorney of the St. Louis court of criminal correction, exactly as in this case, and the judgment of conviction was reversed *only* for the failure to give a certain instruction, and the cause was *remanded for a new trial*, which would not have been done if the information had been fatally defective.

Finding no error in this record, it is ordered that the judgment be affirmed. All the judges concur.

ARTHUR LEE *et al.*, Respondents, v. EMELINE COHICK *et al.*, Appellants.

St. Louis Court of Appeals, April 5, 1892.

Married Women: CHARGING SEPARATE ESTATE. When a married woman makes a contract for herself and on her own credit, the law will presume that she intended to charge her separate estate. Nor does it matter that the person, with whom she has contracted, did not, at the time of the making of the contract, know of the existence of the property which he seeks to charge as such separate estate, nor that the married woman did not have in mind the charging of that particular piece of property.

Appeal from the St. Louis County Circuit Court.—HON. W. W. EDWARDS, Judge.

AFFIRMED.

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R. S. MacDonald and *William W. Cohick*, for appellants.

A. & J. F. Lee, for respondents.

THOMPSON, J.—This case was before the court on a former appeal, and is reported in 39 Mo. App. 672. On that appeal we reversed a judgment for the plaintiff on the ground, that the evidence failed to show that the defendant, Emeline Cohick, had any separate estate at the time of the making of the contract creating the debt, which was there and is here sought to be charged upon her separate estate. After the cause had been thus remanded the plaintiffs filed, without any objection on the defendants' part, an amended petition, in which they sought to charge the alleged debt of Mrs. Cohick not on the same but upon another piece of real estate which was held in trust for her sole and separate use, the legal title being in George M. Cohick. The court rendered a decree establishing the debt of the plaintiffs against Mrs. Cohick, and charging it upon this piece of property, but without charging it upon the piece of property which had been the subject of the charge from which the former appeal was prosecuted. It is not questioned that Mrs. Cohick stood seized to her sole and separate use, through George M. Cohick, her trustee, of this piece of property, at the time of the making of the contract alleged in the petition. It thus appears that the question under consideration in the former appeal has been entirely eliminated from the case. The assignments of error on this appeal may all be reduced to one, which is a challenge of the propriety of the decree upon the whole evidence in the record.

The petition alleges, that, on the thirteenth day of October, 1888, the defendant, Emeline Cohick, agreed with the plaintiffs, who were partners in the practice of the law, that if they would recover for her the sum of

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$6,000, which she alleged to be due her from her husband, *or* if they would cause to be vested in her by trustees a certain described real estate, she would pay them the sum of ten per centum upon said sum of $6,000, provided it could be collected without suit, and one-third of whatever should be collected by suit. It also alleges that, in making said agreement, Mrs. Cohick intended to and did charge her sole and separate estate in the land now described in the petition in the sum of $600 in favor of the plaintiffs. The answers consisted of general denials. The evidence has been examined with care, and is found to be substantially the same as on the trial from which the former appeal was prosecuted. In dealing with the evidence on that appeal this court concluded that, if the plaintiffs' recovery depended upon the question alone whether the alleged contract for their compensation was made by Emeline Cohick, we would not feel warranted in disturbing the decree which had been rendered in favor of the plaintiffs. We are of the same opinion, after re-examining the case in the light of the evidence, as it is furnished in the present record. We do not think it necessary to go into an analysis of the testimony in order to vindicate our conclusion, but deem it sufficient to say that the evidence adduced by the plaintiffs on the question, whether the defendant, Mrs. Cohick, made the contract with them which they have set up in their petition, was more clear, consistent and satisfactory than the opposing evidence adduced by the defendants. The well-known rule, that in cases of conflicting evidence the judges of appellate courts, dealing with the case as chancellors, defer to the conclusions of the trial court, strengthens our conclusion that we must affirm the judgment in this case. Nor do we regard it as a sound conclusion upon the evidence that it shows, if at all, an understanding with Mrs. Cohick that the

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charge should be upon other property than that upon which it has been charged by the decree. Nor do we see sufficient evidence, or any substantial evidence, to warrant the conclusion that the engagement was such as merely would vest in the plaintiff a title to an undivided one-tenth of the property which they procured to be vested by trustees in Mrs. Cohick, to her sole and separate use. The evidence adduced by the plaintiffs clearly was that they were to get ten per cent. for enforcing, without suit, the collection of the supposed demand of about $6,000 due to Mrs. Cohick from her husband, and that they were to get $600, in case they should succeed in having vested in a trustee to her sole and separate use the real property mentioned in the petition, which she preferred to have done rather than have her claim against her husband collected in money. Nor does the fact that the plaintiffs, at the time of making the contract with Mrs. Cohick, did not know of the existence of the property which the decree now charges with the debt thus created, nor that Mrs. Cohick may not have had the matter of charging that particular tract of property in mind, make any difference; since, as she made the contract for herself and on her own credit, the law will presume that she intended to charge her separate estate. *Miller v. Brown*, 47 Mo. 504. We must then conclude that the judgment of the circuit court should be affirmed. It is so ordered. All the judges concur.

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B. F. MILSTEAD, Respondent, v. THE EQUITABLE MORTGAGE COMPANY, Appellant.

St. Louis Court of Appeals, April 5, 1892.

1. **Practice, Appellate:** JUDGMENT FOR RIGHT PARTY. The judgment in this cause is affirmed on the ground that it is for the right party.

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2. **Law and Fact:** INTERPRETATION AND EFFECT OF LETTER. The defendant in this cause transmitted money to a third person in a letter containing directions in regard to the application of the money. *Held*, that the interpretation of the letter was a matter of law for the court; and that the letter showed that the remittance was made to this third person as agent for the defendant, and not as agent for the plaintiff, and was conclusive against the defendant upon that issue.

Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

AFFIRMED.

E. O. Brown and *Karnes, Holmes & Krauthoff*, for appellant.

George Hubbert, for respondent.

THOMPSON, J.—The substance of the petition in this case is that the defendant agreed to lend to the plaintiff the sum of $1,000 on the security of a mortgage of a farm, owned by the plaintiff in Newton county, Missouri; that, in pursuance of the agreement, the plaintiff and his wife executed a first and also a second mortgage of the said farm to a trustee for the use of the defendant, and executed certain promissory notes which were secured by the mortgage, all of which the plaintiff delivered to the defendant; but that the defendant, in violation of said agreement, refused to pay to the plaintiff the sum of money so loaned to him, except the sum of $200, to the plaintiff's damage in the sum of $2,000, for which he prays judgment, etc. The substance of the answer, so far as it is material to state it, is that there was a preliminary "application or contract" in writing, made and signed by the plaintiff, wherein the plaintiff appointed one Randall as the plaintiff's agent to receive from the defendant the papers and the money loaned by the defendant to the plaintiff under said agreement; and that defendant,

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in pursuance of said agreement, paid the sum of $800 in controversy to said Randall as the plaintiff's agent. To this answer the plaintiff filed a reply, the substance of which was that Randall was at all times the agent of the defendant, and not the agent of the plaintiff; and that the clause in the instrument referred to in the answer, which purports to be an "application for a loan," appointing Randall as the plaintiff's agent to receive the money, was imposed upon the plaintiff by the fraud of Randall, acting as defendant's agent, by procuring the plaintiff to sign the application without advising the plaintiff that it contained any such clause of appointment. The case went to trial on two issues: *First.* Whether so much of the application for the loan, as contained the clause appointing Randall as the plaintiff's agent, had been imposed upon the plaintiff by the fraud of Randall acting as the defendant's agent,—that is to say, whether the plaintiff had been induced by Randall, acting as the defendant's agent, to sign the application in question, while concealing from the plaintiff the fact that it contained this particular clause, and under such circumstances as entitled the plaintiff to avoid the effect of this particular clause on the ground of fraud. *Second.* Whether the balance of $800, due from the defendant to the plaintiff under the contract, had been paid by the defendant to Randall as agent for the plaintiff, or to Randall as agent for the defendant. This was the principal and essential issue in the case. The case was tried before a jury, and the plaintiff had a verdict and judgment, and the defendant, appealing to this court, assigns two principal errors: *First.* That the court should have directed the jury to find for the defendant. *Second.* That the court submitted the issue to the jury on erroneous instructions.

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We have come to the conclusion, after examining the whole record, that the court might have directed a verdict for the plaintiff on the pleadings and evidence, and consequently that the verdict is for the right party, and the judgment must be affirmed on that ground. The plaintiff put in evidence some seventy-five or eighty exhibits, annexed to depositions of an officer of the defendant, which depositions were taken by the plaintiff. These exhibits, together with other undisputed testimony, showed that, for more than a year prior to the making of the loan in question, Randall had been the agent of the defendant in Newton county for the procuring and arranging of loans for the defendant, and the examining of titles in cases of such loans, under the most minute instructions from the defendant. These instructions were in writing or print and extended into the smallest details. The evidence also showed conclusively that in the character of agent for the defendant Randall negotiated with the plaintiff for the making of this loan to the plaintiff by the defendant, and that, at the end of the negotiation, Randall presented to the plaintiff the formal written application for the loan required by the rules and practice of the defendant. This paper was headed "Application for a loan," and was addressed to the defendant. It was very much like an application for a policy of insurance, containing twenty-nine questions in print, to be answered in writing, and also a considerable statement in fine type of the grounds and conditions on which the plaintiff made application. Then followed, in the same fine type, the following concluding clause: "I have appointed R. M. Randall as my agent to assist me in obtaining this loan, to whom the papers and money may be sent, and with whom the correspondence may be had." Immediately below this was the space reserved for the signature of the applicant, and in that

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space the plaintiff signed the application. At the time when the plaintiff signed it, he was a cattle-dealer and was in a bank in Neosho, engaged in making some payments; and the paper was brought in by Randall, and the plaintiff signed it, as he testifies, without reading this concluding clause, and without ever having been apprised by Randall that the paper contained such a clause. And he further testifies that he would not have signed it, if he had known that it contained such a clause, because Randall was insolvent; but he seems, nevertheless, to have had confidence in Randall, and to have trusted Randall down to that time. Randall forwarded this application to the defendant at their office at Kansas City, and they made up an account between them and the plaintiff, in which the plaintiff is charged with $1,000, the agreed amount of the loan, and also with $15, the commission of Randall for effecting the loan. The evidence shows that it was the custom of the defendant, in the case of loans made by Randall, to add the commission of Randall to the amount secured by the deed of trust,—in other words to collect the commission of Randall for him, and to advance it to him. The evidence also shows that Randall acted as the defendant's "examiner" in making this loan, and that in his character of examiner he had made to them the customary report, conveying many points of information, on one of their blanks furnished him for that purpose.

The evidence also showed that, Randall having forwarded the application for this loan to the defendant, and the plaintiff having afterward executed all the papers required by the defendant to be executed, in order to perfect the loan, which papers had been sent by the defendant to Randall, and the plaintiff having delivered those papers to Randall, they were forwarded by Randall to the defendant; whereupon the defendant

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remitted to Randall, in a check payable to Randall personally, the sum of $804. This remittance was accompanied by the following letter of instruction from the defendant to Randall:

"KANSAS CITY, MO., July 6, 1887.

"*R. M. Randall, Neosho, Mo.*

"DEAR SIR:—We are in receipt of yours, inclosing papers in loan number 7280, Milstead. We herewith inclose you draft for $804, in part payment of this loan. We have retained $200, which we hold, as agreed upon, until the house is built and $500 insurance furnished.

"Out of the money remitted you, you will please procure deed from railroad company, and show filings of the same on the abstract. Return the abstract to us properly completed as soon as possible.

"We much prefer to procure deeds and pay off prior incumbrances ourselves, not because we lack confidence in our correspondents, but because we find it to be the quickest and safest way. In remitting you this money, and asking you to procure deed, we are acting contrary to our usual rule, and in future we wish you would send us statements of amount required where there are mortgages to be released, and, where deeds are to be procured, send us also the contract, when there is one; and, if you will make it a point to have the statements correct and full, you will find that it will expedite the closing of loans greatly.

"We inclose you herewith a waiver of mechanics' liens, which you will please have executed in this loan, and return to us when the house is completed and we will send you the balance due in the loan.

"Yours truly,

"EQUITABLE MORTGAGE CO."

An analysis of this letter will make it appear that the defendant announced to Randall that they inclosed

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to him the draft for $804, "in part payment of this loan." If the letter stopped here it would probably make a conclusive case in favor of the defendant. But it does not stop here. It goes on and instructs Randall what to do with the money: "Out of the money remitted to you, you will please procure deed from railroad company and show filings of the same on the abstract. Return the abstract to us properly completed as soon as possible." In explanation of this message it should be stated that the evidence showed without any controversy that there was, at the time of the contract under consideration, an unextinguished mortgage on the property which the plaintiff conveyed to the trustee for the defendant as security for this loan, which mortgage had been made to a railroad company, and was to secure a part of the purchase money of the land which the plaintiff had purchased from the railroad company. This direction to Randall first to use the money transmitted to him in clearing off the existing mortgage could only have been made to him on the conception, that he was acting as the defendant's agent. Then follows a whole paragraph of observations and advice and instructions, which could have no application or relevancy on any other theory than the theory that Randall was acting as agent of the defendant in the transaction: "We much prefer to procure deeds and pay off prior incumbrances ourselves, not because we lack confidence *in our correspondents*." The letter does not say "not because we lack confidence in the agents appointed by our customers to assist them in negotiating loans with us." The letter goes on to say: "In remitting you this money, and asking you to procure deed, we are acting contrary to our usual rule," etc. Documentary evidence shows that this statement was not true, but that the defendant had transmitted money to Randall in several other cases,

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to be used by Randall in closing up loans. Then the letter proceeds with a statement of what the defendant wished Randall to do in future, all of which shows that this letter was merely a letter of instructions by the defendant to its own agent. The evidence also shows that no other letter of advice or instruction was sent to Randall with reference to this remittance. This letter, therefore, embodies the terms and conditions upon which this remittance was made to Randall.

The evidence also shows that Randall kept an account with a bank at Neosho as "agent," and that the account was understood at the bank to be, and was in fact, his account as agent of the defendant. This account had previously been kept by the firm of Randall & Amos, who had originally been appointed as agents of the defendant to procure loans for them in Neosho county, and to act for them in reference to such loans; but when Randall & Amos dissolved partnership which appears to have been a short time before the making of the loan in controversy, the pass-book in which this account had been kept remained in the hands of Randall, and he continued to have his memoranda of his deposits as agent of the defendant made therein. The check of $804, which the defendant thus transmitted to Randall to be used by Randall in closing up this loan, was deposited by Randall with his banker in this agency account. Soon afterwards Randall checked out $500 of this money to close up another loan, which defendant, through Randall, had made to one Carter; and he also checked out the rest, and then absconded, and at the date of the trial his whereabouts were unknown. Why Randall used $500 of this money to pay the loan which the defendant had previously made to Carter does not distinctly appear,—though it is a probable inference, that he had received from the defendant money to use in paying this loan to Carter,

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which money he had misappropriated, and that he had made good the deficiency by using $500 of the money placed in his hands for the plaintiff to close up the loan to Carter. The evidence is also distinct to the effect that, before Randall absconded, he did not use the money or any part of it in clearing off the mortgage of the plaintiff to the railroad company, as he was required to do by the letter of instruction of the defendant transmitting the check to him, but that the plaintiff himself cleared off that mortgage after Randall thus absconded.

Our conclusion, upon the whole evidence, is that the question whether the plaintiff did, by a valid appointment, make Randall his own agent to receive this money for the plaintiff, became an immaterial inquiry, in view of the further fact that there was no distinct evidence tending to show *that the defendant ever paid this money to Randall in Randall's character as the plaintiff's agent;* but that the only evidence speaking upon the point, the letter of instructions above set out transmitting the money, shows on its face, that the defendant paid this money to Randall in Randall's character as the defendant's own agent. We conclude also that, as Randall had not, when he absconded, employed any part of the money in clearing off the mortgage held by the railroad company, as the defendant in its instructions had required him to do, when he so absconded he held the money as the agent of the defendant, and not as agent of the plaintiff, and that he embezzled it as money of the defendant and not as money of the plaintiff. It will be the more apparent, when it is considered that it is perfectly obvious on the evidence that the plaintiff could not, at any time prior to the absconding of Randall, have maintained an action against Randall for the recovery of this money, even if the plaintiff had known that Randall had

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received it, which the evidence shows he did not. We also conclude that the question of the character in which Randall received the money might have been declared by the court to the jury as a mere question of interpretation, as that character is shown by the letter of the defendants themselves in transmitting the money to Randall, which letter is conclusive as against them. We are further of opinion that the statement of one of the officers of the defendant in his cross-examination, that Randall received this money as the agent of the plaintiff, was the mere statement of the conclusion of the witness, which conclusion it was for the jury to draw upon the evidence, that being the whole issue in the case, or for the court to draw upon the documentary evidence as a question of interpretation. As the ultimate essential fact was in what character the defendants placed the money in the hands of Randall, whether as their own agent or as the plaintiff's agent, and as their letter of transmission shows that they placed it in his hands as their own agent, and under instructions as to what he should do with it, before turning any of it over to the plaintiff, and as it appears that, at the time when he embezzled it, he had not complied with these instructions, it is quite obvious that his embezzlement is a loss which falls upon the defendant and not upon the plaintiff. We, therefore, conclude that the verdict was for the right party, and laying out of the inquiry other matters must affirm the judgment. It is so ordered. All the judges concur.

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George A. West, Respondent, v. Leo Moser, Appellant.

St. Louis Court of Appeals, April 5, 1892.

1. **Res Adjudicata:** ADMISSIBILITY OF PAROL EVIDENCE. Under a plea of *res adjudicata* parol evidence is not admissible to contradict a judicial record; but, where the record does not distinctly show what was adjudicated in the prior action, this may be proved by parol. 49 201 54 512 49 201 59 28 49 201 82 613

2. ——: ——: PROOF OF NONSUIT AS TO ONE OF SEVERAL COUNTS. In this cause the issue was whether a judgment in a prior action between the same parties, in which the petition contained two counts, determined the rights of the parties under both counts or only under one of them, and it was *held* competent for the plaintiff to establish by oral testimony that he had taken a nonsuit as to one of these counts, though the record of the cause did not recite that fact. 49 201 93 [a]626

3. **Severable Contracts:** FORMER RECOVERY. Where the payments under a contract are to be made in installments, and the party bound to make them refuses altogether to carry out the contract after some of the installments have been earned, the party entitled to payment may at once sue for and recover these installments, and, after the expiration of the period contracted for, sue for his remaining damages; that is, his loss of earnings after such refusal. And *held* that this rule should prevail in this cause, though the suit for the installments earned was instituted after the time appointed by the contract for the payment of a later unearned installment.

4. **Breach of Contract:** MEASURE OF DAMAGES. The defendant in this cause wrongfully refused to execute his contract with the plaintiff. *Held*, that the plaintiff was entitled to recover damages for the nonperformance of what the contract required the defendant to do, but not for more.

Appeal from the St. Louis County Circuit Court. HON. W. W. EDWARDS, Judge.

REVERSED AND REMANDED.

R. M. Nichols, for appellant.

(1) When the contract was broken in July, 1888, this gave a cause of action, and only one; all damages

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flowing from said breach were an entirety; the suit for the keeping of the horses for the months of June and July, 1888, was a part of said damages, and indivisible from any other, which respondent had or could suffer, and the suit for their recovery was an adjudication of all the causes of action flowing from said breach, and should estop respondent in this suit. Bliss on Code Pleading, sec. 118; 1 Sutherland on Damages, p. 175, *et seq.;* Freeman on Judgments, sec. 240; Herman on Estoppel & Res Adjudicata, sec. 259; *Koenig v. Morrison*, 44 Mo. App. 411; *Parks v. Richardson*, 35 Mo. App. 193; *Funk v. Funk*, 35 Mo. App. 251; *Green v. Von der Ahe*, 36 Mo. App. 394. When a person can or may, he must present and sue in one action upon all causes of action growing out of the same contract. If the separate counts were distinct causes, this action was ripe and maintainable, when the judgment was obtained upon the second count, and evidence having been given upon the first count, although it may have been withdrawn, the judgment upon the second count is an estoppel to another action he failed to sustain. Herman on Estoppel & Res Adjudicata, secs. 217, 218; *Epright v. Kaufmann*, 35 Mo. App. 461; *Pinney v. Barnes*, 17 Conn. 420. (2) The court erred in refusing the third instruction offered by appellant, and admitting parol evidence as to the issues in record shown in estoppel, because the record or judgment in evidence conclusively shows what was passed upon in that case: "That the plaintiff take nothing by the first count of his petition," and that he have judgment in the second count for $218.99. Where the record positively shows what was passed upon, parol evidence is inadmissible. *Spaulding v. Conway*, 51 Mo. 54; *Case v. Garton*, 33 Mo. App. 597. The court erred in its construction of the contract. It only binds appellant to keep upon the premises one stallion and three mares for the duration

of the contract, while the court instructed the jury to assess damages on the profits of the highest number of horses brought on the premises, until the termination of the contract. The record shown in estoppel construes the contract to bind appellant only for the actual keeping of the horses, and respondent is bound in this suit by that construction. *Case v. Garton*, 33 Mo. App. 606; *Glasner v. Weisberg*, 43 Mo. App. 215.

H. M. Pollard, for respondent.

(1) The judgment in the prior suit is not a bar to a recovery in this action. *Adler v. Kansas City*, 92 Mo. 249; *Railroad v. Traube*, 59 Mo. 362; *Davis v. Brown*, 94 U. S. 428; *Stark v. Starr*, 90 U. S. 485; *Gardner v. Patton*, 15 N. Y. S. 324; *State v. Morton*, 18 Mo. 53; *Koenig v. Morrison*, 44 Mo. App. 411; *Mfg. Co. v. Davis*, 20 Atl. Rep. 1080; Herman on Estoppel, secs. 227, 258; *Baker v. Cleveland*, 19 Mich. 230; *Ressequie v. Byers*, 52 Wis. 650; Bigelow on Estoppel [5 Ed.] pp. 188–198; *Deems v. Dunkin*, 33 Ala. 47; *Contrell v. Roman*, 16 La. Ann. 422; *Merchants', etc., v. Allego*, 31 Pa. St. 446; *Bank v. Johnson*, 3 Cranch, C. C. 228; *Lenoir v. Wilson*, 36 Ala. 600; *Blum v. Holitzer*, 53 Ga. 82. (2) By the terms of the contract the defendant agreed to pay the stipulated price per head for a number of horses equal to the highest number he had on the farm at any one time.

THOMPSON, J.—This action is brought to recover damages for the breach of a contract, by which, in consideration of the plaintiff's erecting certain stalls and structures on a farm leased and occupied by him in St. Louis county, the defendant agreed to furnish a stallion and a certain number of mares to be kept therein at an agreed price per month, to be paid by him to the plaintiff. The answer embodied: *First.* A general

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denial. *Second.* A plea of *res judicata. Third.* A special defense in the nature of an alternative plea of fraud and mistake in entering into the contract. Nothing concerning the last defense is before us on this appeal. The plaintiff had a verdict and judgment in the sum of $700, and the defendant appeals.

Three substantial questions arise upon the record: *First.* Whether the court erred in admitting parol evidence to show that the first count of the petition in the prior action, pleaded by the defendant as an estoppel, had been voluntarily withdrawn by the plaintiff from the jury by taking a nonsuit as to that count. *Second.* Whether the court was right in instructing the jury that, if they should find that the first count of that petition had been so voluntarily withdrawn by the plaintiff, that action did not estop the plaintiff from maintaining the present action. *Third.* Whether the court was right in instructing the jury as to the measure of damages. We shall consider these three subjects separately, and shall state in connection with each such facts as appear to be sufficient to make our holding understood.

I. In order to understand the first subject of contention, it is necessary to state that the parties had a disagreement as to the amount which should be paid under the contract for keeping the horses for the month of June, 1888, and that the defendant refused to pay the bill which the plaintiff rendered for that month, unless a certain deduction was made, which the plaintiff refused to make. It further appears that at the expiration of the next month, namely, on the thirty-first of July, 1888, the defendant withdrew all of his horses from the premises of the plaintiff. and refused in any manner further to perform the contract on his part. It further appears that on the fifth of September, 1888, the plaintiff instituted a suit in the circuit court of the

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city of St. Louis, against the defendant for breaches of the contract, upon a petition containing two counts. The first count of the petition was for damages for the breach of the contract identical with the allegations of the petition in the present suit. The second count was for the breach of the contract during the two months of June and July, 1888. In other words, the second count was for *past breaches* of the contract at the time when the defendants refused to proceed further with it, and the first count was for damages accruing to him for the refusal of the defendant to proceed in the future with the performance of the contract. The record of the pleadings and judgment in that case does not show a withdrawal of the first count of the plaintiff's petition prior to the verdict. But the record is made up in the usual way, so far as to show that the cause came on for trial, that a jury was impaneled, and the issues were submitted to the jury; and then it recites, "that the trial of this cause progressed, and, being fully terminated, the jurors aforesaid, upon their oaths aforesaid, say they find for the plaintiff and assess his damages at the sum of $218.99," upon which verdict judgment was entered in the usual way. Afterwards another entry of record appeared, setting aside the judgment thus recited, and re-entering *nunc pro tunc*, as of the date of the original entry, the same judgment in favor of the plaintiff and also a judgment in favor of the defendant for costs. This *nunc pro tunc* entry concludes as follows: "Therefore, it is considered by the court that the plaintiff *take nothing by the first count of his petition*, but he recover of the defendant the sum of $218.99, and all costs accrued therein, up to and including the twenty-first day of February, 1889; and that the defendant recover of the plaintiff all costs that have accrued herein since said twenty-first day of February, 1889, and that execution issue in conformity with this judg-

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ment." The peculiarity of this *nunc pro tunc* entry is explained by the statement that the defendant had tendered the sum of $218.99 in his answer, as being due from him to the plaintiff *under the second count.* It thus appears that, according to the record of the prior trial, there was no verdict of the jury responsive to each count, as is required by the rules of civil procedure. It also sufficiently appears that the judgment which was rendered was intended to be rendered under the second count only; for the amount of judgment and the disposition of the costs having reference to the plea of tender can be explained in no other way; nor can effect be given to so much of the *nunc pro tunc* entry, as says that the plaintiff shall take nothing by his first count in any other way. But it also appears that the record is silent as to how the issue made by the first count and the answer thereto passed out of the consideration of the jury or came to be withdrawn, so that it did not form a part either of the verdict or of the judgment, except in so far as the judgment recited, without any verdict upon which to predicate the recital, that the plaintiff should take nothing by his first count. To supply this deficiency the plaintiff offered parol evidence, and, against the objection and exception of the defendant, proved by two witnesses that the plaintiff withdrew his first count from the jury before the cause was finally submitted to them.

In this ruling we perceive no error. Under a plea of *res adjudicata*, it is equally inadmissible, as in any other case, to introduce parol evidence to contradict a judicial record; but, where the record does not distinctly show what was adjudicated in the prior action, this may be proved by parol. The doctrine was thus stated by WAGNER, J., in *Hickerson v. City of Mexico*, 58 Mo. 61, 65: "It is undoubtedly true, that, in some of the earlier cases, it was decided that a judgment was

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conclusive as to all facts arising upon the record which were, or might have been, passed upon. But it is now generally, if not universally, conceded that parol evidence may be received for the purpose of showing whether a question was determined in a former suit. The record may first be put in evidence, and then it may be followed by such parol evidence as may be necessary to give it effect, or show on what issue it was grounded. When a number of issues are presented, the finding in any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than another of these different issues. In order to show by evidence *aliunde* that a matter is *res judicata*, it must appear not only that it was properly in issue in the former trial, but also that the verdict and judgment necessarily involved its determination. If it appears *prima facie* that a question has been adjudicated, it may be proved by parol testimony that such question was not in fact decided in the former suit. Where matters could have been proved in a former action, the presumption is that they were proved, but this presumption may be rebutted and overthrown." This view is not at all incompatible with the holding of the Kansas City Court of Appeals in *Case v. Garton*, 33 Mo. App. 597, to the effect that, where the record is positive and distinct that a certain issue was adjudicated, it is not competent to show by parol evidence that such issue was not adjudicated in the prior action. The record may be explained and its generalities, obscurities or deficiencies may be helped out by parol evidence, as was done in the case before us; but where it is positive and distinct in its recitals it cannot be contradicted. There is obviously no error in the ruling under this head.

II. On the issue of *res judicata*, the court instructed the jury that, "if the evidence shows that said issue was withdrawn from the consideration of the

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jury before submission, and was not considered by such jury, then there can be no finding for defendant on this ground;" and the court refused to instruct them, as requested by the defendant, that if they should believe that the former action contained the same issues as the action depending before them, and that those issues were passed upon in the prior action, their verdict should be for the defendant.

We perceive no error in these rulings. The contention of the defendant is, in substance, that this was an entire contract, and that but one action could be maintained to recover damages for its breach. It is what is called a severable or divisible contract. It was a contract to make certain payments to the plaintiff in installments at a certain rate "per month." The contract uses this expression, "per month," in several places. It says in one place: "In consideration of these structures being prepared and constructed for said Moser's benefit, the said Moser hereby agrees to furnish for keeping in said box, stall and yard one stallion, for which said Moser hereby agrees to pay the said West for keeping the same the sum of $20 *per month* from the time when said barnyard shall be ready for occupancy," etc. Further on it recites: "And the said Moser, in consideration of the aforesaid structures being erected exclusively for his use and benefit, hereby agrees to furnish said stallion and said mares at the above-stipulated prices *per month* for said stallion, and $8 per month for each mare to be furnished for keeping by said Moser, as above stipulated, from the date of delivery," etc. And further on it says: "But it is agreed and understood by and between the parties hereto that, in case of the failure of Moser to furnish other horses or other mares as substitute, it is hereby agreed, and said Moser hereby agrees, to pay said West the sum of $28 *per month* for said stallion and mares,

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and $16 *per month* for the two additional mares to be furnished by said Moser as stipulated above (in all $44 per month) until the termination of the lease of said farm,'' etc. In fact we do not understand that there is any dispute between the parties upon the question that the understanding was that payments under the contract were to be made ''per month,'' and at the close of each month. The bill, which was the subject of adjudication in the former suit for the month of June, was rendered upon that theory, and was objected to upon another ground, and so it seems was the bill for July, which was also adjudicated in that suit.

Now, it is the settled law that, where payments are to be made under a contract *in installments,* a separate right of action accrues to recover each installment whenever that installment is due, and is not paid. The decision of the supreme court of this state in *Adler v. Railroad,* 92 Mo. 242, is to the effect that, where payments under a contract are to be made in installments, and one of those payments is retained by the party who is to make the payment, until a specified time, that installment may be separately assigned, because it is a separate demand or cause of action. In giving the opinion of the court, NORTON, J., said: ''While the contract is entire, there can be no doubt, under the rule, in the case of *Union Ry. & Trans. Co. v. Traube,* 59 Mo. 363, that each monthly payment, as it became due, constituted a separate demand, for the recovery of which an action could be maintained; and there can be no question as to the fact that, within ninety days after the completion of the work, in the event of the non-payment of the retained percentage, that an action would be maintainable for its recovery as a separate and distinct debt or demand. It is this separate demand as an integer which is the subject of the assignment.'' In

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the case referred to in this language, the doctrine is thus stated by NAPTON, J.: "It is now well settled that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it was rendered, whether it includes the whole or only a part of the demand sued on, upon the ground that an entire claim, arising either upon a contract or wrong, cannot be split up into several actions. Where the demands arise out of separate and distinct causes of action, the rule is otherwise. And, even when several claims, payable at different times, arise out of the same contract or transaction, separate actions may be brought as each liability accrues; but in this case it has been held, that, if no action is brought until more than one is due, all that are due must be included in one action, and, if an action is brought when more than one is due, a recovery in that suit will be a bar to a second action brought to recover the other claims that were due when the first was brought." *Union, etc., Co. v. Traube*, 59 Mo. 355, 362, citing *Reformed Dutch Church v. Brown*, 54 Barb. 191. Several other cases in this state reiterate and apply, in various situations, the principle that a party cannot split an entire demand and compel his antagonist to litigate it with him in a number of separate actions; but that, if he elect to litigate one part of it in one action, that action will be a bar to any further action for any other part of it. *Green v. Von der Ahe*, 36 Mo. App. 398; *Koenig v. Morrison*, 44 Mo. App. 411; *Funk v. Funk*, 35 Mo. App. 251, and cases cited; *Moran v. Plankinton*, 64 Mo. 337.

Applying these principles to the facts of this case, we must conclude that they do not operate to bar the present action. The final refusal of the defendant further to proceed with the contract occurred on the thirty-first of July, 1888, when the defendant withdrew all his horses from plaintiff's premises and custody.

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The former action was brought on the fifth of September, 1888. His claim for all other damages accruing to him from the breach of the contract, including what would accrue to him under the contract for the month of August, 1888, was embraced in the first count of his petition, which, as already seen, was withdrawn from the consideration of the jury by his taking a nonsuit as to that. As the plaintiff already had, under the contract, a right of action for each separate installment as it accrued, whether defendant actually kept any horses in his stable or not, the most that can be said, even under the rule as laid down in the language as above quoted from *Union, etc., Ry. Co. v. Traube*, is that the plaintiff, when he brought the former action, was bound to include in that action his claim for the installment due him for the month of August, 1888. But that would not prevent him from waiting until the expiration of the entire period of time covered by the contract, as he did, and then suing for all installments subsequent to that due for the month of August, 1888. But, as the failure of the plaintiff to litigate in the former action, the question of his compensation for the single month of August, 1888, has not resulted in vexing the defendant with a *third* action, we are not prepared to say that it would be proper to exclude that month from his recovery in the present action. On the whole, we are inclined to think that the rule of public policy which prohibits a party from splitting his cause of action and vexing his antagonist with a multiplicity of actions is, under the facts of this case, fully subserved by allowing the plaintiff to recover, as he did in the former action, what was due him for services actually rendered and expenditures actually made under the contract for the months of June and July, 1888, and then to wait until the expiration of the period named in the contract, and then sue for, and recover in

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one action, all damages, consisting of his loss of profits for the breach of the contract by the defendant during the entire remaining period. We, therefore, hold that the circuit court committed no error in its ruling under this head.

III. But we are not able to come to the same conclusion in respect to the third assignment of error. This relates to the measure of damages. Upon this head the defendant requested the court to give the following instruction, which the court refused: "The court instructs the jury that, under the evidence in this case, the defendant had a right to remove all his horses from said premises, excepting one stallion and three mares, at any time he might choose, without in any way being liable to plaintiff for damages for so doing; and, if the jury find a verdict for the plaintiff, in assessing his damages they must not take into account any profits, if any, that the plaintiff might have made on any of the animals other than the one stallion and three mares, nor should they take into account any costs which the plaintiff may have incurred in the erection and construction of any of the stables, sheds, buildings or paddocks upon the Kent farm; and, if they find a verdict for the plaintiff, they must assess his damages only at the contract price, less what it would have cost the plaintiff to furnish the best hay and grain and pasture raised on said farm, for said stallion and three mares from August 1, 1888, to June 3, 1890."

Instead of this the court gave the following instruction at the request of the plaintiff, the defendant excepting: "The jury are instructed that, if they find for plaintiff, they will assess his damages at such sum as they believe from the evidence his profit would have been on the keeping of one stallion and the *highest number of mares defendant had for keeping on plaintiff's*

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farm at any time from June 3, 1887, to July 30, 1888, from the time defendant removed his horses from said farm to the third day of June, 1890; and, in estimating such profits, they will subtract the actual cost to the plaintiff of the hay and grain said horses would have eaten, and their necessary bedding, from the amount defendant bound himself to pay by said contract, viz., $20 per month for said stallion and $8 per month for each of said mares, to which should be added the value of their manure."

We know of no principle, which can make the measure of the plaintiff's damages the highest number of mares defendant had for keeping on plaintiff's farm at any time from the beginning of the contract to its final breach by the defendant on July 30 (should be 31), 1888. The plaintiff is entitled to recover the damages sustained by him by reason of the defendant not doing what he agreed to do, and no more. The contract was drawn by a justice of the peace, and not by a lawyer, and, hence, its provisions are not as clear and distinct as they might have been made. But a careful reading of it shows that the defendant never assumed to do more than to furnish to the plaintiff one stallion to be kept at $20 a month and three mares to be kept at $8 per month, making a total of $44 per month. That being the most that the defendant agreed to do, the measure of damages of the plaintiff is the profit that he lost by reason of the failure and refusal of the defendant to do that from the thirty-first of July, 1888, until the period of the expiration of the lease which the plaintiff held under his landlord Kent,—which was the period named in the contract. The damages awarded by the jury appear to be very small when gauged by the theory laid down in the instruction given them by the court, but, as we are unable to discover from their verdict what theory they may have taken as to the

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amount of profit which would have accrued to the plaintiff under the contract during the months wherein the defendant refused to furnish any horses to the plaintiff to be kept, we are unable to direct a *remittitur*, and must reverse the judgment and remand the cause for another trial of the plaintiff's damages under the construction of the contract as declared in this opinion. It will be so ordered.

All the judges concurring, the judgment is reversed and the cause remanded.

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JOHN R. BARTLEY by Next Friend, WM. H. BARTLEY, Respondent, v. JOHN H. TRORLICHT *et al.*, Appellants.

St. Louis Court of Appeals, April 5, 1892.

1. **Action by Servant Based on Injuries Caused by Defective Elevator:** SUFFICENCY OF THE EVIDENCE. The evidence in this action, which was a suit by a servant against his master for damages for personal injuries caused by the fall of an elevator, is considered, and it is *held* sufficient to establish that the elevator was defective, and that the master was negligent in not discovering the defects, and to warrant the submission of the cause to the jury.

2. ———: SPECIFICATION OF DEFECTS: ELECTION. The petition in the cause having specified a number of defects in the appurtenances of the elevator, which were not inconsistent with each other nor repetitions of each other, but were separate and cumulative specifications of different defects, it is *held* that the plaintiff could not be required to elect on which of these specifications he would go to trial.

3. ———: DIMINISHED EARNING CAPACITY AFTER MAJORITY: PLEADING. When the plaintiff in such an action is a minor, he need not specially plead as damages that his earning capacity after he will have attained his majority will be diminished; moreover, a general allegation of permanent disability to labor by reason of the injuries complained of embraces a claim for such damages.

4. ———: ———: EVIDENCE. Such damages may be allowed in favor of a minor, though there is no direct evidence of them, their amount being referred to the judgment of the jury as a matter of common experience.

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5. **Evidence of Special Damages Which Have Not Been Pleaded:** WAIVER OF OBJECTION. *Held*, in the course of discussion, that if evidence of special damages is admitted without objection, the right of objection on the ground that the damages were not specially pleaded is lost.

6. **Master and Servant:** EXTENT OF MASTER'S OBLIGATION TO FURNISH PROPER APPLIANCES. A master is under an absolute duty to use reasonable care and inspection in regard to the machinery and appliances placed by him in the hands of his servant for use. As between himself and his servant he cannot relieve himself from this responsibility by delegating or leaving to another the care of the machinery, and his obligation to his servants in this regard will, therefore, not be affected by the fact that he rented the machinery as part of a building, nor by the further circumstance that a third person, as employe of his landlord, has been intrusted with the supervision of the machinery.

7. **Contributory Negligence on Part of a Child:** INSTRUCTIONS. An instruction in this cause defined the care, which the plaintiff, who was a child, was bound to exercise, as such care "as boys of his age, experience and discretion usually exercise." *Held, per curiam*, that this instruction was faulty, in that it made the requisite care depend upon the discretion of this particular child instead of the discretion reasonably to be expected of a boy of his age, but that the error was not prejudicial so as to necessitate a reversal of the judgment in his favor. But *held* by THOMPSON, J., that the instruction was correct.

Appeal from the St. Charles Circuit Court.—HON. W. W. EDWARDS, Judge.

AFFIRMED.

Lubke & Muench, for appellants.

J. A. Talty and *A. R. Taylor*, for respondent.

THOMPSON, J.—This action is brought to recover damages, alleged to have been sustained by the plaintiff in consequence of personal injuries, received by him through the falling of an elevator in the building of the defendants in St. Louis, which was being operated at the time by the plaintiff as an employe of the defendants. The action was brought in the circuit court of the city of St. Louis, but a change of venue was taken

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by the plaintiff to the circuit court of St. Charles county, where there was a trial by a jury, which resulted in a verdict and judgment in favor of the plaintiff in the sum of $2,000; to reverse which the defendants prosecute this appeal. Numerous errors are assigned, which we shall separately consider, in what seems to be their proper order.

I. The plaintiff was driven by successive demurrers to his third amended petition. In that petition he charged that, on the day of the accident and for a long time prior thereto, the elevator and machinery and appliances thereto were in a dangerous and defective condition, and unsuitable and unfit for the use to which the defendants were applying the same. He then proceeded to make ten distinct and separate specifications of those defects. After the jury were sworn and before any testimony was taken, the defendants moved the court to require the plaintiff to elect on which one of the numerous specifications of defects in the elevator and machinery the plaintiff would go to trial. The court overruled this motion, and the defendants excepted. There was plainly no error in overruling this motion. The specifications of defect were not inconsistent with each other, nor were they mere repetitions of each other, but they were separate and cumulative specifications of different defects in the condition of the elevator and machinery annexed thereto. The case, therefore, presented no resemblance to the case, where an answer sets up inconsistent defenses in separate paragraphs, or where a petition sets up inconsistent grounds of action in separate counts. Suppose that the trial court had sustained the motion, and then the defendant had elected to go to trial on all the specifications; upon what ground then, known to the rules of procedure, could his judgment have been reversed, because he had failed to introduce evidence tending to prove all of

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them? Or, if the plaintiff had elected to go to trial upon *all* of them, could the court have required him to reject one or three or five or any number of them?

II. The next assignment of error, which we shall consider, is that the court erred in submitting the case to the jury. We do not take this view. The evidence is quite voluminous, but, without undertaking to set it out in detail, it is sufficient for the disposition of this point to say that it tended to show that the defendants kept a carpet store in the city of St. Louis, having four floors or stories; that they used, for ascending and descending between these various floors or stories, an elevator known as an Otis elevator; that this elevator had been in use about eleven years at the time of the accident; that it had no counter balance or descending weight, such as is now generally used on elevators, but which was not usual on this pattern of elevator at the time when it was constructed; that it frequently went with a jerking motion, and often too slowly; that it frequently caught and bound at the top, that is, against the top of the fourth stage or floor, when it would be necessary to get it down with the aid of the engineer in the basement by his starting the fly wheel; that it often worked in a shackly way; and, finally, that on the day of the accident it fell, stunning the plaintiff, who at the time was operating it, and inflicting serious injuries upon him. It appeared that after the fall, some parts of it were found broken, and that especially a certain pinion was found broken in two in consequence of an old and undiscovered break therein. But there was also evidence tending to show that this flaw or defect was in such a position, that it could not be discovered without taking apart the drum of the elevator, and that this would take three men fifteen hours. Without going into the countervailing evidence, which is not necessary for the purpose of this question, we

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conclude that there was substantial evidence to take the question of the negligence of the defendants to the jury. Then, as to the contributory negligence of the plaintiff, the evidence clearly did not make out a case of contributory negligence on his part, such as would have enabled the judge as a matter of law to say, either upon the evidence furnished by the plaintiff or upon an undisputed or unchallenged state of evidence, that he had been guilty of contributory negligence.

III. It is next assigned for error that the court, at the request of the plaintiff, gave an instruction to the jury on the measure of damages, which authorized the jury to give damages "for any loss of earnings after he shall have arrived at the age of twenty-one years." Two objections are made to this ruling: *First.* That there was no distinct averment in the petition, that the plaintiff would sustain damages in the way of loss of earnings after he should arrive at the age of twenty-one years. *Second.* That there was no evidence directly tending to show that he would sustain such a loss of earnings. We do not regard this assignment of error as well taken. The argument that loss of such earnings in an action for personal injuries is in the nature of *special damages*, and must be specially averred in the petition, is predicated on the decision of the supreme court in the recent case of *Mellor v. Railroad*, 105 Mo. 455, 464. In that case the court *in banc*, reaffirming an opinion written by BARCLAY, J., of division number 1, declares the proper rule to be: "Loss of earnings is a kind of injury which is not regarded as a necessary consequence of such acts as are complained of here, and, therefore, is not embraced within the plaintiff's general allegations of damages. It is one sort of special damages, and, consequently, must in somewise be counted upon to constitute a basis for evidence on the subject." It will be perceived, upon an examination of

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the case in which this rule is declared, that the loss of earnings there under consideration was the loss of *past earnings* by an adult who, at the time of the injury, was employed at a definite salary. There is nothing in the opinion to indicate that the rule was intended to extend to the loss of future earnings,—or rather to the damages which may be supposed to accrue from an impaired earning capacity through a total or partial physical disability. It has never been the practice, in drawing petitions in actions for damages for personal injuries in this state, to make special allegations as to the damages which will accrue from the diminution of the future earning capacity of the plaintiff or the person injured, in order to let in evidence of such an element of damage, or in order to warrant the jury in giving damages under that head. The two Missouri cases, cited by the supreme court in support of the proposition, were both cases of past damages,—in one of them a doctor's bill already incurred (*O'Leary v. Rowan*, 31 Mo. 117), and the other past traveling expenses. *State to use v. Blackman*, 51 Mo. 319.

Upon the next branch of the argument, that there was no evidence tending to show what the loss of the earning capacity of the plaintiff after arriving at the age of twenty-one years, in consequence of the injury, would be, it is to be observed that this is answered by the recent unreported decision of the supreme court in the case of *Rosenkrats v. Railroad.* In that case it was held not error for the court to instruct the jury, in the case of a very serious injury to a child four years of age, that they might award damages "for loss of earnings after he shall have attained the age of twenty-one years, although there was no evidence specially bearing upon the question how much such loss of earnings would probably amount to." The opinion in that case, which is written by Mr. Justice MACFARLANE, concedes that, in

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the case of an adult, proof should be made of "previous physical condition and ability to labor or follow his usual avocation, as well as his condition since the injury, to enable the jury properly to find the pecuniary damage." But the court also says: "What may or may not be done by anyone in the future depends upon so many contingencies that prospective loss of earnings cannot be susceptible of direct or conclusive proof, even in the case of adults. Nevertheless, as has been seen, such damages are uniformly allowed. The impairment of the earning capacity of one in his infancy is as great a damage to him as though he had not been injured until the day he reached his majority. That he would have an equal right to compensation logically follows. The plaintiff had never earned anything, and what his ability for labor, or his capacity for earning money in business pursuits, will be in the future no one can tell with any certainty. It is properly held in such cases, in the absence of the existence of direct evidence, that much must be left to the judgment, common experience and enlightened conscience of the jurors, guided by the facts and circumstances in the case."

The propriety of this conclusion is further supported by the fact, that what damages such future loss of earning capacity will probably entail upon a plaintiff refers itself to a question of common experience, which, if attempted to be proved could only be proved by the *opinions* of witnesses; and on such a question the opinions of the witnesses would not be controlling any more than on a question of value, but the jurors would have a right, in deciding it, to use their own judgment and experience.

The conclusion of the supreme court, that it is not necessary in the case of an infant to introduce evidence specially bearing upon the question of the damages

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which would accrue from his loss of future earning capacity, makes it more clear that such damages need not be specially alleged. They are the damages which may naturally be expected to flow from a physical disability, either total or partial, and consequently fall within the legal definition of general damages. The right to recover such damages is fairly embraced in a petition, such as the one before us, which contains an express averment of a permanent disability to labor accruing from the injury complained of. Furthermore, it was held by the supreme court in *Mellor v. Railroad*, *supra*, that even in the case of past damages for loss of earning capacity, the objection that such damages are not claimed in the petition is untenable, where evidence tending to show such damages is admitted without objection. Such was the case here. General evidence tending to show a permanent disability, which would include a loss of earning capacity, was admitted without objection; nor could an objection have been successfully interposed.

IV. The next assignment of error is that the court, at the request of the plaintiff, gave an instruction defining the care required of the plaintiff to be such care "as boys of his age, experience and discretion usually exercise." I am of opinion that this was a correct definition. In *Williams v. Railroad*, 96 Mo. 283, it is said, speaking with reference to this question: "If the boy used that care which may be reasonably expected from boys of his age and capacity, then he was not guilty of contributory negligence," etc. In *Eswin v. Railroad*, 96 Mo. 296, it is said: "The plaintiff ought not to recover, until there is a clear finding that this boy, at the time of the accident, was using the care and caution which might be expected of one of his age and capacity." In *Ridenhour v. Railroad*, 102 Mo. 287, it is said: "The standard of his duty was such

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reasonable care and diligence as characterized the average boy of his age." In *Lee v. St. Louis, etc., Co.*, 6 Mo. App. 578, the language of the abstract is: "The test is, not the conjecture of the jury, but the care which a boy of ordinary caution would have used." In *O'Flaherty v. Railroad*, 45 Mo. 73, quoted by this court in *Duffy v. Railroad*, 19 Mo. App. 389, the language is: "All that is necessary to give a right of action for an injury inflicted by the defendant is, that the injured person should have exercised care and prudence equal to his capacity." It would require a great refinement to discover any substantial distinction between these definitions and that given in the instruction complained of. The standard established in all of them is the ordinary or reasonable care, which is the standard of the law. The ordinary care, in the case of adults, is the care which adults in the given situation ordinarily exercise; ordinary care, in the care of infants, is the care which infants at a given age, capacity, experience or discretion ordinarily or usually exercise. And this is the "reasonable care" of the law; because, if the law exacted of an infant, as the right to recover damages for a grievous injury, a higher degree of care than the ordinary care of infants of his age, situation, experience, capacity and discretion, it would establish a rule which, as against him, would be unreasonable. But I must add that my associates do not quite agree with me as to this instruction, as stated at the close of this opinion.

V. The next assignment of error relates to the giving of the following instruction at the request of the plaintiff: "5. If the jury find from the evidence in this case that the plaintiff, John R. Bartley, was, on the eighteenth day of December, 1888, a minor about the age of nearly fifteen years; and if the jury further find from the evidence in this case that on said day the plaintiff was in the service of the defendants at

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their place of business in the city of St. Louis as an elevator boy, and that it was at said time the duty of the plaintiff to operate a passenger elevator between the floors of defendants' said place of business for the defendants.

"*And if the jury further find from the evidence that said elevator and the machinery and appliances thereof were on said day and for a long time prior thereto in a defective condition,* AND UNFIT FOR THE USE TO WHICH DEFENDANTS WERE APPLYING THE SAME.

"*And if the jury further find from the evidence that said elevator was in a defective condition*, and that the brake of the engine was defective and did not work.

"And if the jury further find from the evidence that defendants or either of them, or their agent having charge of keeping said elevator and appliances in repair, either knew, or by the exercise of ordinary care could have known, of said defective condition of said elevator and brake, and by the exercise of ordinary care could have repaired said defects before plaintiff's injury as herein set forth.

"And if the jury further find from the evidence that, on the eighteenth day of December, 1888, the plaintiff was operating said elevator for the defendants in the discharge of the duty of his employment, and that whilst so operating said elevator, owing to said defective condition of said elevator and brake, said elevator was caused to fall and injure said plaintiff.

"And if the jury further find from the evidence that, before and at the time of the fall of said elevator, the plaintiff was exercising ordinary care, the plaintiff is entitled to recover."

We are not quite able to understand the nature of the objection to this instruction, except that defendants complain of the part which they have put in italics, and especially of the clause which they have put in

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small capitals. It is to be observed that the different paragraphs of this instruction are connected by the conjunction "and." It is, therefore, to be taken as a whole, and the jury could only understand that it is to be considered as a whole. They could not infer from the parts which have been put in italics and small capitals that they were authorized to find for the plaintiff, if the elevator or machinery was defective in any other particular than in such a particular as made it dangerous to those in it when it was in motion. It would be absurd to suppose that a jury, under this instruction, could fall into the error of supposing that they could give damages, because the elevator might have been unfit in some particular which made it not a desirable elevator for use, as that it moved too slowly, or would not carry passengers enough at one time. We think this, taken as a whole, a good instruction.

VI. Error is next assigned upon the giving, at the request of the plaintiff, of the following instruction: "11. If the jury find from the evidence in this case that the plaintiff, prior to and on the eighteenth day of December, 1888, was in the service of the defendants as an elevator boy, and that it was the duty of the plaintiff, under said employment, to run defendants' elevator between the floors of defendants' business house mentioned in the evidence, then it was the duty of the defendants to have exercised ordinary care under the circumstances to keep said elevator and the machinery thereof, in a condition of repair reasonably suitable and safe for the plaintiff to operate the same.

"And if the defendants intrusted this duty to one Scott, the engineer, the acts of said Scott pertaining to said duty, were the acts of defendants.

"And if the jury find from the evidence that the pinion of said machinery was broken and out of repair, and insufficient for the work for which it was used; and

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if the jury find from the evidence that said Scott knew, or by the exercise of ordinary care under the circumstances would have known, of such defective condition of said pinion, and could by the exercise of ordinary care have repaired said defect and averted injury from plaintiff; and if the jury find from the evidence that plaintiff, at the time of and just preceding his injury, was exercising ordinary care; and if the jury find from the evidence that plaintiff, while in said elevator in the discharge of his said duty, was injured by a fall of said elevator; and if the jury find from the evidence that said elevator was caused to fall and injure plaintiff by reason of said defective pinion, then plaintiff is entitled to recover."

The objection is leveled against so much of this instruction as authorized a verdict upon the hypothesis of the accident happening in consequence of the broken pinion. The nature of the objection will best be seen from the following quotation from the printed argument submitted by counsel for the appellants: "Plaintiff offered no evidence whatever about this pinion. Defendants brought that into the case by their testimony, and showed conclusively that there was nothing but an inherent and unknown hidden defect in it, not discoverable by anyone while the pinion was in place. Defendant's proof of this was in no manner contradicted, and no issue was left for the jury to decide as to this pinion. To authorize the submission of an issue, there must be evidence to sustain a finding, which the court would not feel itself compelled to set aside."

An examination of the evidence, so far as it relates to this instruction, makes it appear that the only evidence in the case, touching the subject of the pinion being broken, was furnished by two witnesses of the defendants, one of them the engineer of the owner of

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the building who had the elevator and machinery in his charge, and the other the superintendent of the firm of machinists under whose direction the elevator had been taken apart and repaired eight years before. From the testimony of the former of these witnesses it appeared that the elevator had not been taken to pieces for the purpose of inspecting it since that time, though it had been frequently repaired in respect of the supplying of ropes and other external matters that were liable to wear out. The evidence of such witnesses showed that this pinion was an essential part of the machine; and we infer from their testimony, and from the course of their examination by counsel for the defendants, that it was the defendants' theory that the elevator broke and fell in consequence of the latent defect in this pinion. The jury had a part of this pinion before them, and, in the examination of the witnesses, a sketch is referred to from which it might be inferred that a sketch of the machine was used upon the trial, and that the jury had a much better idea of the nature of it than we can gather from the written evidence without any sketch or model. Now, the evidence of the engineer called as a witness for the defendants was to the effect that after the accident happened this pinion was found broken; that it contained a new break, and also an old break; that the old break was on the external side, but on the side which was in such a position with reference to the drum of the machine, that it could not be seen at all when the pinion was in position, without removing the drum; and the other of these witnesses testified that it would take three men fifteen hours to remove the drum so that this break in the pinion could be discovered, and there was no countervailing evidence. Neverthe-less, we think that, in view of the fact that these witnesses showed that this pinion was an essential part of the machine, that the old break in it probably

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produced the accident, and that it had not been taken apart for inspection for eight years, the jury were authorized, in view of the obvious danger to human life of any essential part of such a machine getting out of order so as to render the machine liable to fall, to conclude that the defendants may have been negligent in not requiring it to be taken apart and inspected for so long a period as eight years,—especially when such an inspection would probably have discovered this defect, and have prevented the accident. Nor were the jurors bound to accept the opinion of a machinist that it would take three men fifteen hours to remove the drum so as to discover the defect. That was a matter of expert and opinion evidence; and, with such a description of the machine as the jurors had before them, they may have been entitled to conclude that it would not take so long, or subject defendants to so great an expense or inconvenience. But in any event it was an expense or inconvenience, which is to be balanced against the sacredness of human life; and we, therefore, find ourselves unable to say that the court erred in allowing the jury to find for the plaintiff upon the hypothesis contained in this instruction. It is quite immaterial for the purposes of the case, whether this evidence had been adduced by the plaintiff or by the defendants. If the defendants gave evidence which tends to help out the plaintiff's case, the plaintiff has a right to avail himself of that evidence, and to stand upon it before the jury.

VII. In our judgment the next error is not well assigned. It is that the court erred in giving the plaintiff's instruction marked 4. This instruction was as follows: "4. If the jury find from the evidence that, prior to and on the eighteenth day of December, 1888, the plaintiff was in the employment of the defendants as an elevator boy, and that it was a part of his duty as

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such to run defendants' elevator between the floors of defendants' place of business mentioned in the evidence; and if the jury find from the evidence that the valves of the engine which operated said elevator were in a defective condition, and that the defendants, or their agent in charge of keeping said machinery in repair, either knew, or by the exercise of ordinary care under the circumstances would have known, of said defective condition of said valves before plaintiff's injury, and could by the exercise of ordinary care have repaired said defect and have averted plaintiff's injury; and if the jury further find from the evidence that, whilst plaintiff was running said elevator, by reason of said defective condition of said elevator, it fell and injured plaintiff; and if the jury further find from the evidence that plaintiff was exercising ordinary care at the time of and just preceding his injury, then the plaintiff is entitled to recover."

The objection to this instruction is that there was no evidence tending to support the hypothesis contained in it, that the valves were defective. We do not so understand the record. Thomas Williams, who was called as a witness for the plaintiff, testified that he had been a stationary engineer for about twenty-four years. Although he was not acquainted with the particular elevator which fell in this case, yet he had run an elevator of the same pattern made by Otis, the patentee. He testified that, if such an elevator were in good condition, it would not, when stationary, sink or drop unless the rope was pulled. He also testified that such an elevator would not stick when the car was at the roof, if in proper order. When asked, what in his opinion would cause the elevator to act that way, he said, among other things, that it might be caused by a leaky valve. Another witness gave similar testimony. Now, the plaintiff gave evidence tending to show that

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the elevator did act that way; and this we think was substantial evidence, though possibly of a weak character, tending to show that the accident may have been caused by a leaky valve, and authorizing the court to submit the case to the jury on that hypothesis.

VIII. It is next assigned for error that the court refused the following instruction submitted by the defendants: "2. If from the evidence the jury believe that the elevator in question did not belong to Trorlicht, Duncker & Renard, but was a part of the building, and was leased by defendants as a part of said building; and if the jury further believe that defendants, in using said elevator in their occupation of said building, exercised ordinary care and prudence, and that the elevator fell because of some hidden defect in its construction unknown to defendants, and which defect they would not have discovered by ordinary care, then the jury will find for the defendants.

"By ordinary care is meant that degree of care, which an ordinarily prudent person would exercise under the like circumstances."

We see no error in refusing this instruction, for the reason that every hypothesis contained in it, except that expressed in the first sentence, is contained in another instruction which the court did give at the request of the defendants. That instruction is as follows: "The court also instructs the jury that defendants, Trorlicht, Duncker & Renard, are not liable in this suit simply because the boy was in their employ and was hurt. Defendants were not insurers. The gist of the action is the charge of negligence, and that must be established by a preponderance of proof against defendants. If the proof bearing on the charge of negligence does not preponderate in favor of plaintiff Bartley, then a case is not made out against defendants, and the jury should find for them.

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"The court also instructs the jury that they must be satisfied from the evidence that the injuries to his back, here complained of by plaintiff, were caused by the fall of the elevator, and that this fall resulted because of the want of ordinary care on the part of the defendants.

"If from all the evidence the jury believe that the fall of the elevator happened because of a hidden defect in its construction, which defect a person of ordinary care and prudence would not have discovered with ordinary care, and that defendants did not know thereof, then you should find in favor of defendants.

"Or if from the evidence the jury believe that the elevator and machinery connected therewith were reasonably safe to be used, then the defendants had the right to use the same in the exercise of ordinary care. They were not bound to have absolutely safe machinery."

The hypothesis in the above refused instruction that the elevator did not belong to the defendants, but was a part of the building, and was leased by the defendants as a part of the building, was an immaterial hypothesis, and might have operated to mislead the jury; and the presence of that hypothesis in the instruction, therefore, constituted a good ground for refusing it as drawn. Whether the elevator and machinery used in opening it was leased as a part of the building, or not, was utterly immaterial to the liability of these defendants. A master is under *an absolute duty* to use reasonable care and inspection in regard to the machinery and appliances placed by him in the hands of his servants to use, to the end that they shall be reasonably safe for the uses intended. If he rents a building with such machinery and appliances in it, he cannot, so far as affects his liability to his servants, cast this duty upon his landlord, so as to exonerate himself.

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IX. For the same reason the court committed no error in refusing the third instruction tendered by the defendants, which was as follows: "3. The court also instructs the jury that, if from all the evidence the jury believe that the falling of the elevator complained of here was caused by the neglect of Mr. Scott, the engineer, the defendants are not liable, and you should find for the defendants."

This instruction is erroneous in point of law. It is argued in support of it that the evidence tended to show that Scott was employed by the owner of the building to attend to all the elevators in the building, and to run the steam engine operating them. This is true; and in that regard Scott was an *independent contractor*, so to speak, with reference to these defendants. But the rule which exonerates a party for the negligence of an independent contractor applies only between that party and a stranger; it does not apply between him and his own employe or servant. The absolute duty of exercising reasonable care, to the end that the machinery and appliances placed in the hands of his servants will not endanger their lives or members, rests upon him equally, whether he attempts to exercise that duty through an independent contractor, through another servant, or by himself in his proper person. When the defendants entered into an arrangement—no matter with whom—by which they intrusted the care and inspection of this elevator and machinery to Scott, the engineer, the latter became their vice-principal to that extent and for that purpose, so far as their servants were concerned. The correct legal doctrine under this head is stated by Mr. Justice FIELD, in a decision of the supreme court of the United States, thus: "It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient

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and safe materials, machinery or other means, by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, *no duty required of him for the safety and protection of his servants can be transferred*, so as to exonerate him from such liability." *Northern Pacific Ry. Co. v. Herbert*, 116 U. S. 647. All of the decisions of our supreme court and of this court state this duty of the master in positive terms, which necessarily imply that he cannot cast it off either upon any independent contractor or upon another of his servants. Thus, in the case of *Porter v. Railroad*, it is said: "It is the duty of the employer to provide for his servants, good, safe and properly constructed machinery and implements for carrying on his business, and to use reasonable care and precaution for the safety of the employes. By this, however, it is not meant that he is an insurer of their safety and under an absolute obligation to provide safe machinery and implements, but only that he is to use reasonable care and precaution in procuring them and keeping them in good order and condition." 71 Mo. 76. So in a case in this court, where the subject was carefully considered, it is said: "While the employer is not an insurer of the absolute safety of the machinery or appliances he furnishes, he is bound to provide such instruments with which to carry on his business, as are reasonably safe, secure and sufficient for that purpose. If he fails to provide and maintain such, and, in consequence of this breach of duty on his part, the employe suffers injuries, the employer is responsible for the injuries thus caused." *Clowers v. Railroad*, 21 Mo. App. 213, 217. In another case it was said, speaking with reference to the liability of a railway company toward its employes: "It was the duty of the defendant to furnish to its employes cars

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reasonably safe and sufficient for the purpose for which they were to be used by such employes; and, in absence of notice to the contrary, the deceased had the right to assume that the car which he mounted in the line of his duty, and on which he was attempting to set or tighten the brakes when it broke, was so safe and sufficient." *Parsons v. Railroad*, 94 Mo. 286, 292. But we need not extend quotations to show that this duty is the duty which the law casts upon the master, nor repeat arguments to show that, the law having cast the duty upon the master, he cannot transfer it to an independent contractor.

This disposes of all errors which have been assigned by the defendants, and we conclude that the record presents no substantial error prejudicial to them. It is, therefore, ordered that the judgment be affirmed. All the judges concur in this result, and in the reasoning of the opinion, with the exception of the fourth paragraph discussing the instruction touching contributory negligence. My associates are of the opinion that that instruction is faulty, inasmuch as it makes the care to be exercised by the boy depend upon the discretion of the boy, instead of the discretion which might reasonably be expected of a boy of that age; they do not, however, consider the error prejudicial so as to warrant a reversal of the judgment on that ground alone.

JOHN S. SHERRELL, Respondent, v. JOHN L. MURRAY, 49 233
Appellant. 92 510

49 233
St. Louis Court of Appeals, April 5, 1892. 99 ¹166
99 ¹215

1. **Evidence:** JUDICIAL NOTICE: POWERS OF CITY TO RESTRAIN RUNNING AT LARGE OF ANIMALS. Courts will take judicial notice of the power of a city by ordinance to restrain the running of hogs at large within the corporate limits of the city, outside of the owner's inclosure.

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2. **Instructions:** NOT SUPPORTED BY EVIDENCE. **An instruction, not supported by any evidence in the cause, is erroneous.**

Appeal from the Howell Circuit Court.—HON. W. N. EVANS, Judge.

REVERSED AND REMANDED (*with directions*).

Squire & Wilkinson, for appellant.

No brief filed for respondent.

ROMBAUER, P. J.—This is an action of replevin, begun before a justice of the peace, for the recovery of the possession of six head of hogs. The plaintiff had judgment for possession in the circuit court on appeal, and the defendant assigns for error that the judgment is erroneous under the conceded facts, and that the court misdirected the jury as to the law.

Plaintiff's ownership of the animals is conceded. The defendant is marshal of the city of Willow Springs, and justifies the taking and detention of the hogs under an ordinance of the city, the material portions of which are as follows:

"*An Ordinance Concerning Hogs Running at Large.* Be it ordained by the board of aldermen of the city of Willow Springs as follows:

"Sec. 1. The mayor shall elect and establish a place within the corporate limits for impounding hogs.

"Sec. 2. The marshal (or any police officer) shall take up any hog running at large on the public streets or places, and impound it. He shall at once give notice to the owner, if known; if not, by one week's publication in some newspaper of general circulation in the city, or by posting notices in three public places, describing the hog, and giving the date and place of sale; that it will be sold to defray costs, if it is not

reclaimed and costs paid within a week from publication of said notice; if not then claimed, he shall sell the hog at public auction, apply the proceeds to the payment of the poundage and expenses, and retain the balance in trust for the owner of the hog. If the balance is not claimed within a year from the sale, it shall be paid into the general fund of the city.

"Sec. 3. The following shall be the fees charged as poundage, all of which shall be paid to the marshal or pound-keeper, who shall have charge of the pound. For each seizure fifty cents; for each day's retention of each hog, twenty-five cents; for each auction, regardless of hogs sold, fifty cents."

It appears, both by the plaintiff's and defendant's evidence, that plaintiff's hogs were running at large and impounded only shortly before; that they were turned out the preceding time upon plaintiff paying a nominal charge; that, upon the day in question, they were impounded again, of which fact the plaintiff had notice at once; that he thereupon called upon the defendant, demanding his hogs, and the defendant told him he would have to pay $1.50, or twenty-five cents for each hog, before they were turned out; that the plaintiff refused to do so, and immediately thereafter and on the same day instituted this action.

It is difficult to see how, upon this state of the evidence, there was any question in the case left for the consideration of the jury. We are bound to take judicial notice of the fact that all town corporations, by the laws of this state, have power to pass ordinances to regulate and prohibit the running at large of hogs and other animals in the streets and alleys of such town, and all city corporations have power by ordinance to restrain any animal from running at large within the corporate limits of the city outside of the owner's inclosure.

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There is no pretense in the evidence that the hogs were not running at large within the corporate limits when taken up, and, in the absence of any evidence on that subject, the presumption is that the defendant, as city marshal, did his duty. The ordinance, when introduced, was objected to as invalid, without specifying any ground of objection, and the court properly overruled the objection, and admitted it in evidence.

The court, of its own motion, gave the following instruction, the concluding part whereof, placed in italics, probably furnishes the explanation of how the jury arrived at this extraordinary verdict: "The court instructs the jury that the ordinance introduced in evidence by the authority of which the defendant claimed to hold the hogs in question is a legal ordinance, and that the city of Willow Springs had authority to pass such an ordinance; and, if you shall find from the evidence that the defendant was, at the time said hogs were taken up by him, acting as marshal of said city of Willow Springs, and took up such hogs by virtue of the ordinance introduced in evidence and held them by virtue of such ordinance, you must find for the defendant, and assess his damages at the amount of the legal charges prescribed by such ordinance, *unless you further think defendant failed to comply with the provisions of such ordinance himself.*"

Now there was no evidence whatever in the case that the defendant failed to comply with the provisions of such ordinance himself, and what the jury might have *thought* on that subject was wholly immaterial. The only conceivable departure by the defendant from his duties under the ordinance was that he demanded twenty-five cents only for each hog, whereas he was entitled to at least fifty cents. If he would have demanded more than he was entitled to, it would have been the duty of the plaintiff to tender what was justly

due as a condition precedent to his right of recovery in an action of replevin, but his having demanded less cannot even furnish a pretense for the action. Nor could it for a moment be contended that the defendant's failure to give notice to the owner *at once*, assuming that the notice relates to the taking up of the hogs and not to their sale, cut any figure in this case. All the testimony concedes that the owner knew of it *at once*, that is, within a few hours, and replevied the hogs the same day. The defendant testified that he gave to the plaintiff personal notice at once, and even the plaintiff admitted that he knew of the fact the same morning when it occurred. The law of the case was correctly declared by the court, if we reject the modification placed in italics above. The modification was wholly unwarranted by any evidence in the case, and only furnished a pretext to the jury to find a verdict for the plaintiff, of which it would seem they readily availed themselves.

The judgment will be reversed and the cause remanded with directions to the trial court to enter a judgment in favor of the defendant and against the plaintiff and his sureties in the replevin bond for the return of the property and costs, the plaintiff to have the option of satisfying such judgment by the payment of $3 and costs to the defendant, such amount being the ascertained value of defendant's interest in the property. So ordered. All the judges concur.

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49 237; 64 128; 49 237; 65 326

THE STATE OF MISSOURI, Respondent, v. FREDERICK MATHEIS, Appellant.

St. Louis Court of Appeals, April 5, 1892.

1. **Practice, Appellate:** PRESUMPTIONS. It cannot be presumed that the trial court failed to properly admonish the jury at the time of an adjournment in a criminal proceeding, when the record fails affirmatively to show that this was the case.

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2. ———: NON-DIRECTION OF JURY IN PROSECUTION FOR MISDEMEANORS Under section 4208 of the Revised Statutes, 1889, the mere non-direction of the jury does not constitute error in a prosecution for a misdemeanor.

Appeal from St. Louis Court of Criminal Correction. HON. GEORGE W. ANDERSON, Special Judge.

AFFIRMED.

Martin & Bass, for appellant.

The record shows that there was an adjournment of the case during its progress. It was the court's statutory duty to admonish the jury at the adjournment. It should affirmatively appear of record that this was done. R. S. 1889, sec. 4209. "In all prosecutions for * * * for verbal slander * * * the jury, under the direction of the court, shall determine the law and the fact." Const. Mo., art. 2, sec. 14; R. S. 1889, sec. 3872. The court failed to give this plain, constitutional and statutory direction to the jury.

Bernard Dierkes, Prosecuting Attorney, and *P. W. Fauntleroy*, for respondent.

ROMBAUER, P. J.—Upon an information charging the defendant with criminal slander he was tried and convicted. He assigns the following errors upon this appeal: *First*. That the court failed to admonish the jury at the hour of adjournment. *Second*. That there is no substantial evidence in support of the verdict. *Third*. That the court misdirected the jury as to the law. The second assignment of error has been abandoned by the defendant as untenable.

Touching the first assignment of error it will suffice to say that it does not affirmatively appear by the record that the jury were not admonished, nor does it appear that the defendant excepted to any action of the court in the premises. The assignment is, therefore, not tenable. *Ex parte Durbin*, 102 Mo. 100; *State v. Burk*,

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89 Mo. 635. We need express no opinion on the question whether such an omission, even if affirmatively shown by the record, and properly excepted to, would furnish ground for reversal in the absence of evidence that the jury have been tampered with.

For the purposes of this argument it is conceded by the state that the legislature could, under the constitutional provision, that "the right of trial by jury as heretofore enjoyed shall remain inviolate," validly enact section 3872 of the Revised Statutes of 1889, which provides: "In all [criminal] prosecutions for libel or verbal slander * * * the jury under the direction of the court shall determine the law and the fact."

It is also conceded by the state, for the purposes of this argument, that the very sensible construction placed by the supreme court on this section in *State v. Hosmer*, 85 Mo. 553, has been questioned in the later case of *State v. Armstrong*, 16 S. W. Rep. 604, and that there is room for the argument that the defendant in a case of criminal slander has a right, *if he so demands*, to have the jury charged that they are the judges of the law and facts in the case. But the state does not concede that mere non-direction of the jury on this question can furnish ground for vacating the verdict in any case.

The defendant's third assignment of error rests on the provisions of the above section, and on the further provision contained in section 4208 of the same statutes, which declares that "the court must instruct the jury in writing upon all questions of law arising in the case, which are necessary for their information in giving their verdict, and a failure to so instruct *in cases of felony* shall be good cause, when the defendant is found guilty, for setting aside the verdict of the jury and granting a new trial." The italics are our own.

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The record shows that, while the court did fully instruct the jury in this case on the law and the evidence, it did not instruct them that it was their province to determine both the law and fact under the direction of the court.

Since the last amendment of the statute by insertion of the words, "in cases of felony," italicized above, non-direction alone in a case of misdemeanor can furnish no ground for setting aside a verdict. To work that result it must appear that the jury were either misdirected, or that the court refused to give legal instructions asked by the defendant on points not covered by the instructions of the court.

In the case at bar the defendant asked no instruction touching the question of the jury's rights to determine the law and fact under direction of the court; hence, the defendant cannot urge the omission of the court to charge the jury on that point as a ground for setting aside their verdict. This view of the law dispenses with the further inquiry, whether the defendant's motion for new trial is sufficiently broad to cover a complaint for non-direction.

We have carefully examined the instructions given and find nothing in any of them of which the defendant can justly complain. All the judges concurring, the judgment is affirmed.

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J. D. Davis *et al.*, Appellants, v. Joseph Johnson, Respondent.

St. Louis Court of Appeals, April 5, 1892.

Contract of Subscription: RIGHT OF ACTION. If the subscribers to a subscription list thereby agree with a person named to pay him their respective subscriptions upon the erection of a certain building by him, he can, upon the execution of the agreement on his part, enforce the payment of the subscription by suit. Nor will the

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non-performance of an agreement, made by the subscribers among themselves, and not by the persons contracted with, constitute any defense to such a suit.

Appeal from the Dent Circuit Court.—Hon. C. C. Bland, Judge.

Reversed and remanded.

L. Judson and *L. B. Woodside*, for appellants.

The subscription made by defendant and promise by him to pay the sum of $100 was a valid promise, and the plaintiffs having complied with the terms of their contract were entitled to recover the amount of the subscription from the defendant. *Workman v. Campbell*, 46 Mo. 305; *Koch v. Lay*, 38 Mo. 147. The contention of defendant was that Jones, having subscribed the $100 to the articles of incorporation, released the defendant from his obligation. The company could not be incorporated until all of the stock had been signed. G. S. 1889, sec. 2768, p. 705. It was necessary for the articles of agreement to be signed by all of the stockholders. G. S. 1889, sec. 2769. When Johnson refused to sign the articles and refused to pay the money, plaintiffs' right of action accrued, and the subsequent act of Jones in signing the articles of incorporation did not estop plaintiffs from demanding the money of defendant.

No brief filed for respondent.

Rombauer, P. J.—This is an action upon a contract of subscription. The plaintiffs agreed in writing with the defendant and a number of other subscribers that, in consideration of $5,800, subscribed for and to be paid to them, they would erect at Salem, Missouri, a butter and cheese factory of certain dimensions and capacity. By the terms of the contract the subscribers agreed to accept the building as soon as completed, and to pay the amount set opposite their respective names. The subscription paper further provided that as soon as

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the amount of $5,800 was subscribed, or within a reasonable time thereafter, the subscribers would incorporate, fixing the aggregate amount of the stock at $5,800, to be divided into shares of $100 each, said shares to be issued to the subscribers in proportion to their paid-up interest. The defendant signed this paper, setting the sum of $100 opposite his name.

The suit was brought before a justice, where the plaintiffs had judgment. Upon the trial in the circuit court, the plaintiffs introduced the subscription paper and proved the defendant's signature thereto for the amount stated. They also proved that the entire amount of $5,800 had been subscribed for, and that they had completed the building according to the terms of the subscription paper, and turned it over to the corporation formed by the subscribers, receiving in return the entire amount of subscription, less the $100 subscribed for by the defendant.

The plaintiffs also gave evidence tending to show that, when the corporation was formed, the defendant was requested to subscribe the articles as one of the corporators, but declined to do so on the ground that he had never signed the contract of subscription. As it was necessary under the laws of the state that some person should subscribe for this $100 of stock to secure an incorporation in the amount mentioned in the contract of subscription, another person did subscribe therefor, but the stock issued to him was tendered to the defendant upon the trial.

Upon this evidence the court declared as a matter of law that the plaintiffs could not recover, and rendered judgment for the defendant. This is the error complained of.

As we have not the benefit of any brief from the respondent, we are not advised of his theory, or the theory of the court. We can conceive of no theory

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which would uphold the judgment rendered. The defendant had filed an answer, in which he alleges as a defense, among other things, that another person took the $100 of stock to which he would have been entitled in case he would have become a stockholder of the proposed corporation, and that all of the stock of the corporation had now been subscribed and paid for. That question is entirely foreign to this controversy. As soon as plaintiffs had completed their part of the agreement and delivered the building to the subscribers, or their representatives, their right of action against each of the subscribers for the amounts subscribed by them respectively became complete. *Workman v. Campbell*, 46 Mo. 305; *James v. Clough*, 25 Mo. App. 147. The plaintiffs did not agree to incorporate the subscribers, but the subscribers agreed to incorporate themselves. The plaintiffs' contract was not with any corporation thereafter to be formed, but with each individual subscriber, and their cause of action did in no sense depend upon the fact, whether the subscribers did or did not form a corporation, or did or did not give to the defendant any stock.

We mention these facts, because in the absence of any other explanation we presume the court nonsuited the plaintiffs on the ground that some one else had subscribed with the knowledge of the plaintiffs for the $100 of stock to which defendant would have been entitled, had he paid his subscription, and that such fact appeared by plaintiffs' evidence. While that fact amounts to no legal defense whatever, it is not even entitled to an equitable consideration, because the stock certificate was tendered to the defendant upon the trial, removing any vestige of ground for complaint on his part.

In view of a retrial of the cause, we direct the attention of the trial court to *James v. Clough*, *supra*, where

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the other defense sought to be set up in the defendant's answer is substantially disposed of.

All the judges concurring, the judgment is reversed and the cause remanded.

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HARRY WALKER, Respondent, v. THE TOWN OF POINT PLEASANT, Appellant.

St. Louis Court of Appeals, April 5, 1892.

1. **Highways:** PLEADING. The petition in this cause is considered, and *held* to state a cause of action against a municipal corporation for injuries occasioned by defects in a public highway within the corporate limits.

2. **Municipal Corporation:** PLEADINGS. Section 2186 of the Revised Statutes of 1889 applies to municipal corporations as well as private corporations, and, under its provisions, the corporate existence of a defendant sued as a municipal corporation is admitted, unless denied by plea under oath.

3. ———: LIABILITY FOR INJURIES CAUSED BY DEFECT IN HIGHWAY. In order to render a municipal corporation responsible for injuries caused by defects in one of its public highways, express notice to it of the defects need not be shown; it will suffice, in respect to notice, that the municipal authorities might have known of the defects by the exercise of ordinary care.

4. **Towns:** ESTABLISHMENT OF STREETS: REPAIRS. A highway situated within the corporate limits of a town and used by the public for travel becomes for all legal purposes a street, and, while it is thus used by the public, the duty of repairing it rests exclusively upon the town. It is not necessary that the adoption of the highway as a street of the town should be made by ordinance.

Appeal from the New Madrid Circuit Court.—HON. H. C. O'BRYAN, Judge.

AFFIRMED.

Robert Rutledge, for appellant.

(1) The court was mistaken as to the law in this case, and proceeded upon the theory and belief that the road in question was one of the public streets of

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the city. This was simply a wagon road along the bank of the river. To constitute a public street there must be an ordinance establishing it, or an acceptance in some manner, by the city. *Skrainka v. Oertel*, 44 Mo. App. 474; *Churchman v. Kansas City*, 44 Mo. App. 665. (2) The court erred in giving instruction, numbered 1. It is based upon a wrong theory of the law, and assumes that the road was a public street. It is long, vague, indefinite and unexplained, and misled the jury as to the liability of defendant. *Clark v. Kitchen*, 52 Mo. 316; *Dunn v. Dunnaker*, 87 Mo. 597; *Gerren v. Railroad*, 60 Mo. 405. Instructions, numbered 2, 3 and 4, are equally defective and do not cure the first. They assume that the road in question was a public street established or adopted by the city, whose duty it was to keep it in repair, as well as all bridges thereon. The instructions are not warranted by the evidence. The town authorities were only bound to keep such streets, and such parts of streets, in repair, as were necessary for the use of the traveling public. *Brown v. Mayor, etc., of Glasgow*, 57 Mo. 156; *Bassett v. The City of St. Joseph*, 53 Mo. 290. (3) The court should have given instruction, numbered 5, asked by the defendant. There is no evidence on which to base a verdict. *White v. Chaney*, 20 Mo. App. 389; *Nolan v. Shickle*, 3 Mo. App. 300; *Walker v. Martin*, 8 Mo. App. 561. (4) Instruction, numbered 6, asked by the defendant and refused by the court, properly declared the law, and should have been given, It was the defendant's duty to keep in repair only such streets and bridges as it had established or adopted, and were necessary for the traveling public. *Brown v. Mayor, etc., of Glasgow*, 57 Mo. 156; *Bassett v. City of St. Joseph*, 53 Mo. 290; *Moore v. City of Cape Girardeau*, 103 Mo. 470; *Churchman v. Kansas City*, 44 Mo. App. 665.

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W. W. Corbett, for respondent.

ROMBAUER, P. J.—The suit is one to recover damages for personal injuries, sustained by the plaintiff owing to the defective condition of one of the defendant's bridges on a public highway. The defendant, appealing, assigns for error that the petition states no cause of action, and the evidence shows none, and that the court misdirected the jury as to the law.

Such parts of the petition, as bear upon the question presented, are in the following words: "That the defendant is a municipal corporation under the laws of said state located in said county, with power and authority to sue and be sued; that plaintiff, on the second day of August, in the year 1890, was engaged in transporting the United States mail to and from the town of Point Pleasant to the town of New Madrid in said county; that, on the day aforesaid, while plaintiff was on said route aforesaid, on the public road leading to and from said towns, in attempting to cross one of defendant's bridges within the corporate limits of said defendant, which bridge spanned a ditch or gully across said public road, owing to the bad condition of said bridge, the plank upon the same having decayed from constant use and wear, there were several dangerous holes in the bridge, which were partially covered over with short pieces of plank, one of these pieces having in some way gotten misplaced, one of the horses driven by plaintiff got one of its feet hung or entangled in the hole, and, in trying to extricate it, became frightened; the team ran away, throwing plaintiff out of the vehicle, dislocating his elbow joint, his shoulder, and otherwise seriously injuring plaintiff. Plaintiff charges at the time of said accident he was driving in a careful and cautious manner; that, previous to said

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accident, he had repeatedly made complaint to defendant, its agents and officers, of the bad condition of said bridge, and that no notice was taken of same; that, owing to the failure of defendant to keep said bridge in proper repair, whose legal duty it was so to do, plaintiff's injury resulted."

To this petition the defendant first answered. Upon the trial, without withdrawing the answer filed, it filed a general demurrer on the ground that "the petition failed to state what sort of corporation defendant was, and by what law created." This demurrer was overruled, and properly so, as a party cannot raise both issues of law and fact covering the same ground; he cannot both demur and answer to the whole of the plaintiff's petition; and by answering he waives all defects in the petition, excepting the defect that it states no cause of action at all, and that the court has no jurisdiction of the subject-matter. The defendant now claims that the petition states no cause of action, an objection which is never waived. This objection is not well taken. The petition is inartificially drawn, but it sufficiently appears from its averments by necessary intendment, that the defendant is a town corporation created by the laws of this state, and that the injury occurred owing to a defective bridge on a public highway within the corporate limits, which highway and bridge it was the defendant's duty to keep in repair.

The defendant next contends that there was no proof of defendant's incorporation, nor any proof that the highway and bridge in question were under the defendant's control, and that it was under any obligation to repair the same.

Touching the first point it will suffice to say that the defendant's answer was not supported by affidavit. In *Pierce v. Town of Lutesville*, 25 Mo. App. 317, we decided that, under section 3653 of the Revised Statutes

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of 1879, as amended by the act of 1883 (which amended section is now section 2186 of the Revised Statutes of 1889), the existence of a municipal corporation, as well as of a private corporation, is admitted, unless denied by plea under oath. Although proof was offered in this case by the plaintiff tending to show the defendant's incorporation, we are not required to examine the sufficiency of such proof, since, in view of our decision in the case of *Pierce v. Town of Lutesville*, *supra*, there was no valid plea of *nul tiel corporation*.

Touching the other points of the assignment we find evidence in the record that the road in question was a traveled highway within the corporate limits of the defendant; that the defendant levied and collected road taxes for the repair of roads within its corporate limits, and that the defendant had repaired the bridge in question shortly after the occurrence of the accident. In *Brennan v. City of St. Louis*, 92 Mo. 488, it was intimated that proof of subsequent repair was admissible as evidence that the defect was one which the city was bound to repair. As the plaintiff's injuries were shown to have resulted from the defective condition of the bridge, and there was no showing of any such contributory negligence on his part as would debar him of recovery, the defendant's assignment that the evidence fails to support the verdict is clearly untenable.

We have examined the instructions given on behalf of the plaintiff and find no error therein of which the defendant has any right to complain. They were fully warranted by the ruling of the supreme court in *Bonine v. City of Richmond*, 75 Mo. 437, and *Squires v. City of Chillicothe*, 89 Mo. 226. The evidence was ample to the effect that this bridge had been out of repair for months prior to the accident, and that the town authorities might have known of the defect by the exercise of ordinary care. It is not the law that express notice to

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the town authorities of such defects must be shown as a condition precedent to liability of the town.

Complaint is also made of the refusal of the following instruction, asked by the defendant: "The court instructs the jury that, in the absence of an ordinance establishing said street or road and defining its boundary lines, the city will not be liable for damages arising from defective bridges thereon, though said road may have been used by the public, and was within the corporate limits of the town, and that it was not the duty of defendant—unless said street was established by ordinance—to keep the bridge or crossing on said road in repair."

That the *locus in quo* was a bridge forming a part of a public traveled highway is conceded by all the evidence, and it is not substantially controverted that it was within the incorporated limits of the defendant town corporation. Under the statutes of this state the inhabitants of town corporations are exempt from working on roads outside of the corporate limits, and all streets within the corporate limits are placed under the control of the board of trustees. R. S. 1889, secs. 1674, 1677. The control of the county authorities over highways within incorporated limits of a town is necessarily withdrawn and placed in the town trustees. It results from the foregoing that any such highway, situated within the corporate limits of the town, becomes for all legal purposes a street, and that, while being used as such by the public, the duty to keep the same in repair rests exclusively with the town authorities. 2 Dillon on Municipal Corporations [4 Ed.] sec. 676, *et seq.* We intimated in *State ex rel. Mermod v. Heege*, 39 Mo. App. 50, that county authorities had no power to establish a county road within boundaries of a town. The highway in question here is part of an old highway shown by the evidence to have been in use by the

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public many years anterior to the incorporation of the town of Point Pleasant and ever since; and the claim that the adoption of such a highway as a street can be shown only by ordinance of the town has been distinctly denied in *Beaudean v. City of Cape Girardeau*, 71 Mo. 392. We must conclude, therefore, that the above instruction, asked by the defendant, was properly refused.

The judgment is affirmed. All the judges concur.

JOSIAH WHITESIDES, Respondent, v. THE ST. LOUIS, KEOKUK & NORTHWESTERN RAILROAD COMPANY, Appellant.

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St. Louis Court of Appeals, April 5, 1892.

Justices' Courts: JURISDICTION OF ACTION AGAINST RAILWAY COMPANY FOR KILLING STOCK. In order to warrant a recovery in an action against a railroad company instituted before a justice of the peace for the negligent killing of cattle, it must be shown that the cattle were killed in the township in which the action was commenced, or in an adjoining township.

Appeal from the Pike Circuit Court.—HON. E. M. HUGHES, Judge.

REVERSED AND REMANDED.

Clark & Dempsey and *Palmer Trimble*, for appellant.

Joe Tapley, for respondent.

ROMBAUER, P. J.—This is an action to recover damages for the negligent killing of plaintiff's cow by defendant's train. The amended statement, filed in the circuit court on appeal, averred thatthe killing occurred

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in Burr Oak township, which adjoins Hurricane township. The suit was instituted in the latter township. The plaintiff recovered judgment upon his evidence, the defendant offering none. At the close of the evidence the defendant requested the court to instruct the jury that the plaintiff could not recover, and now assigns the refusal of this instruction for error.

There was no evidence tending to show that the killing occurred in Burr Oak township, or that the defendant operated a railroad in said township. Under the provisions of section 6126, Revised Statutes of 1889, suits of this character must be instituted either in the township where the killing occurred, or in an adjoining township. These facts, as the supreme court has frequently decided, are jurisdictional, and must be shown by the evidence. A mere allegation of the fact in the statement, unless admitted to be true, will not suffice. *Milburn v. Railroad*, 86 Mo. 104, 110; *Backenstoe v. Railroad*, 86 Mo. 492, 494; *King v. Railroad*, 90 Mo. 520, 522.

For this reason the defendant's demurrer to the evidence should have been sustained. The judgment is reversed and the cause remanded. All the judges concur.

SAMUEL SCOTT, Respondent, v. HENRY C. RILEY, Appellant.

St. Louis Court of Appeals, April 5, 1892.

1. **Replevin:** BURDEN OF PROOF. *Held, arguendo*, that if the plaintiff's title is denied in an action of replevin; naked possession is not sufficient to sustain his right of action, but he must prove property, general or special, in the article replevied.

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2. **Witness, Competency:** DEATH OF ONE PARTY. When one party to a suit claims title to personalty in controversy under the distributees of a decedent, and the other party claims title to the property under a gift *causa mortis* from the decedent, the latter party is not a competent witness to establish the gift.

Appeal from the New Madrid Circuit Court.—HON. H. C. O'BRYAN, Judge.

REVERSED AND REMANDED.

Lubke & Muench and *R. B. Oliver*, for appellant.

W. W. Corbett, for respondent.

ROMBAUER, P. J.—The questions of law arising in this case cannot be well stated without an introductory recital of the following uncontroverted facts appearing from the record, and bearing upon the present controversy.

One, Belle Allen, a single woman, was the owner of a watch and chain. She died, and, after her death, this property was found in the possession of the plaintiff, and he was arrested on the charge of having acquired it feloniously, but, upon the trial, was acquitted of any felonious intent. In the meantime the plaintiff had placed the property as security with one Drulinger, and the defendant, who is an attorney-at-law, brought an action of replevin against Drulinger on behalf of Mary Jane Allen, the mother of Belle Allen, presumably on the theory that she, as mother, was entitled to this property as distributee, and, in such action, recovered the watch and chain. The plaintiff, thereupon, instituted this present action of replevin against Mary J. Allen and the defendant Riley; but, upon its trial, dismissed it against Mary Jane Allen, and recovered judgment for possession of the property against the defendant alone. The defendant

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appeals, and assigns for error, among other things, that the court admitted illegal evidence against him.

The plaintiff claims the property as a gift *causa mortis* from Belle Allen, who was his fiancee, and he was permitted upon the trial, against the objections of the defendant, to prove by his own evidence the contract of gift under which he claimed. The defendant excepted to this ruling and preserved his exceptions by motion for new trial, and this constitutes the above assignment of error.

Possession is *prima facie* evidence of ownership. Where, therefore, the plaintiff shows a lawful prior possession, and that the defendant has taken the property out of such possession, he may, upon such showing, maintain an action of replevin against anyone who can show no better title. *Bayless v. Lafaivre*, 37 Mo. 119, 123. But, where the plaintiff's title is denied, naked possession is not sufficient to maintain this action, but the plaintiff must prove property, general or special, in the article. *Gartside v. Nixon*, 43 Mo. 138; *Gray v. Parker*, 38 Mo. 160. As this action was instituted before a justice of the peace, the defendant's appearance put in issue the plaintiff's title, and it was incumbent upon him to show more than a mere antecedent, naked possession. This the plaintiff endeavored to do by tracing his title to the property by a gift *causa mortis* made to him by Belle Allen, the unquestioned prior owner. He was an incompetent witness for that purpose.

The statute provides that, when "one of the original parties to a contract or cause of action in issue and on trial is dead, * * * the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding, whose right of action or defense is

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derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor." R. S. 1889, sec. 8918. The supreme court, in construing this statutory provision, held that the disability thus imposed is coextensive with every occasion where such contract or cause of action is sought to be asserted upon the trial (*Chapman v. Dougherty*, 87 Mo. 617), regardless of the fact whether the witness testifying is a party to the record or not, provided he testifies in his own favor. *Meier v. Theiman*, 90 Mo. 433. Here the plaintiff was a party to the record, and a party in interest, and his testimony was offered to prove the terms of a contract between himself and a decedent, under whom the adverse party to the record rightfully or wrongfully claimed as a distributee.

The entire subject of "*donationes mortis causa*" was imported from the civil law. According to the provisions of Justinian's code, it required the testimony of five witnesses to establish such a gift. All cases discussing the subject concur that it must be established by clear evidence. *Ward v. Turner*, 1 White & Tudor's Lead. Cas. 934, note 2. It is true that in the chancery and ecclesiastical courts, wherein litigation touching this subject was had almost exclusively, the donee was a competent witness in his own behalf simply because he was not excluded as such by any rule of court (*McGonnell v. Murray*, 3 L. R. Eq. 465); yet even then corroborative evidence was generally required. But it does not follow from this that, even regardless of any statutory prohibition, he would be a competent witness at common law in his own behalf where he was either a party to the record or a party in interest. The general rule of the common law excluding parties thus situated from testifying would clearly apply to him. This question has incidentally been decided by the

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supreme court, since the briefs in this case were filed, in an opinion delivered March 12, 1892, in *Dunn v. Bank*, which went up from the St. Louis circuit. In that case the donee was offered as a witness in his own behalf to establish the gift of a certificate of deposit against the public administrator. The trial court ruled the witness incompetent for the purpose, and the supreme court affirmed the ruling.

It is evident from the foregoing that the plaintiff was an incompetent witness to prove the contract under which he claims title, and that his testimony should have been excluded. As his own testimony is all that he offered, the judgment must be reversed, and it is unnecessary to notice other errors complained of, as they cannot occur on a retrial of the cause.

Judgment reversed and cause remanded. All the judges concur.

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JOSEPH STEINBERG, Respondent, v. THE PHŒNIX INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant.

St. Louis Court of Appeals, April 5, 1892.

1. **Evidence:** CLERK'S INDORSEMENT OF FILE MARK ON PAPERS. The indorsement, made by the clerk on a bill of exceptions, of the fact and date of the filing of the paper is competent evidence of those matters.

2. **Reformation of Contract:** MISTAKE OF ONE PARTY ONLY. To entitle a party to the reformation of a contract for mistake, the mistake must be mutual; mistake on the part of the complainant alone will not suffice. And *held*, further, in the course of discussion, that the mistake must be established by evidence which will strike the mind of the chancellor as free from reasonable doubt.

3. ———: LACHES. It is the duty of the insured to examine a policy insuring him against loss by fire, and see whether it contains the contract bargained for, and the retention of the policy without complaint until after loss, and for an unreasonable time—over four months in this case—debars the right of reformation.

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4. **Recovery on Theory Inconsistent with the Pleadings.** A plaintiff cannot recover upon a theory of the case adverse to that upon which his petition proceeds.

Appeal from the Lincoln Circuit Court.—HON. E. M. HUGHES, Judge.

REVERSED.

G. W. Barnett, for appellant

(1) This being a suit in equity the appellate court is not bound by the findings of the court below upon questions of fact, but will exercise a supervisory control over the lower courts in a case like this, and, if not fully satisfied with the conclusions of fact reached by the trial court, will reject them and make findings of its own. *McElroy v. Maxwell*, 101 Mo. 295; *Benne v. Schnecko*, 100 Mo. 250. (2) The evidence was not sufficient to authorize the findings and decree of the court, and the court, therefore, erred in rendering a decree for plaintiff. This is a suit in equity to reform an insurance policy, and before this can be done both the agreement and the mistake must be made out by the clearest evidence—such as will strike all minds as unquestionable and free from reasonable doubt. *Forrester v. Scoville*, 51 Mo. 268; *Tesson v. Ins. Co.*, 40 Mo. 33; *Atkins v. Henry*, 80 Mo. 157; *Fessenden v. Ockington*, 74 Me. 123; 1 Story's Equity Jurisprudence [11 Ed.] p. 161; *Meade v. Ins. Co.*, 64 N. Y. 454; *Hearne v. Ins. Co.*, 20 Wall. 488; Wood on Insurance [2 Ed.] pp. 1092, 1105; *Cooper v. Ins. Co.*, 50 Pa. St. 299; *Guernsey v. Ins. Co.*, 17 Minn. 104; *Ice Co. v. Ins. Co.*, 31 Barb. 72; *McHugh v. Ins. Co.*, 48 How. Pr. 230. If it were true that the agent Duncan made such a contract with plaintiff as is alleged in the petition, yet that would not be sufficient to bind the defendant, because such agent had no authority to

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make a contract of insurance, but only to take applications, and while the agent, simply authorized to take applications, binds the company so far as relates to the application, he cannot make a contract of insurance. Before there can be a recovery in this case it must appear that some agent of the company authorized to accept and pass on the application, or authorized in some way to consummate the contract, agreed to the contract as alleged by plaintiff. *Guernsey v. Ins. Co.*, 17 Minn. 104; *Williams v. Edwards*, 94 Mo. 447; Wood on Insurance [2 Ed.] pp. 44, 46, 842; *Hamilton v. Ins. Co.*, 6 Biss. 9; *Neville v. Ins. Co.*, 19 Ohio, 452; *Moore v. Ins. Co.*, 72 Iowa, 414.

Martin, Avery & Young and *R. H. Norton*, for respondent.

Rombauer, P. J.—This is a suit in equity. The plaintiff's petition prays for a reformation of a fire insurance policy, and for judgment upon the policy thus reformed. Upon the trial there was judgment in conformity with the prayer of the petition. The defendant, appealing, assigns for error that the judgment of reformation is not supported by the weight of the evidence, nor by any evidence, and that, in absence of reformation, the defendant was entitled to judgment upon the conceded facts.

A preliminary question arises as to the bill of exceptions. The plaintiff claims it forms no part of the record, and should be disregarded, and in support of his claim cites *Fulkerson v. Houts*, 55 Mo. 301; *Johnson v. Hodges*, 65 Mo. 589, and *Jones v. Christian*, 24 Mo. App. 540. The two cases first above cited had reference to the state of the law before its amendment in 1885, which first permitted the filling of bills of exceptions in vacation, and the last case is decided upon

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their authority, although it is not clear whether the bill in controversy there was filed before or after the law of 1885 took effect. In the case at bar the bill of exceptions, according to plaintiff's statement, has the file mark of the circuit clerk indorsed thereon, showing that it was filed November 28, 1891, and within the sixty days granted by the court, and the transcript recites that it was filed on that day. This, under our recent ruling in *Pugh v. Ayers*, 47 Mo. App. 590, is sufficient to make the bill of exceptions part of the record.

The plaintiff's petition states, in substance, that the defendant issued to him its policy insuring him against loss by fire to the amount of $1,500, from July 1, 1890, to July 1, 1891; that this policy contained the clause, "$1,000 additional insurance, concurrent herewith, permitted elsewhere;" that, when the plaintiff made his application for this insurance, he had $2,500 other insurance on that property, covered by two policies, one for $1,500 and the other for $1,000; that it was then and there agreed between him and the local agent of the defendant that such other insurance should remain on the property until the expiration of the $1,000 policy, and that thereafter the plaintiff would carry insurance to the amount of $3,000 on the property, inclusive of the $1,500 carried by the defendant, but that the defendant, instead of issuing to him a policy in conformity with such agreement, issued to him one containing a clause above recited as to concurrent insurance; that plaintiff, being illiterate and unfamiliar with the English language, did not notice this discrepancy until after the happening of the loss.

The petition then prays for a reformation of the policy in conformity with the agreement, states the loss, the performance of conditions precedent on his part, and prays for judgment for $1,500.

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The answer denies that there was any mutual mistake in the policy, and denies that the defendant ever made any other contract with the plaintiff than the one expressed in its policy. The answer further states that it was distinctly understood at, and prior to, the time when the defendant issued its policy, that the plaintiff would be permitted to carry only $1,000 other concurrent insurance on the property. The answer then claims that the defendant is not liable for the loss owing to the following facts: That there is a clause contained in the policy to the effect that "this policy shall be void, if the assured now has or shall hereafter make any other insurance, whether valid or not, on said property or any part thereof, unless consent is indorsed by the company on said policy;" that, while the policy only permits $1,000 concurrent other insurance, the plaintiff carried from July 1, to August 13, 1890, $2,500 other concurrent insurance, and $1,500 of such insurance from the latter date until the date of the fire, and thereby rendered said policy wholly void at the time of the fire.

The answer was replied to, but touching the fact, that the plaintiff did carry concurrent insurance in excess of $1,000 during the entire time between July 1, 1890, and the date of the fire, there is no controversy.

The plaintiff's evidence tended to show the following facts: He was a merchant, and began business in August, 1889. He insured his merchandise at that date in the sum of $1,500, the policy expiring in August, 1890; and he took out, in November, 1889, $1,000 additional insurance, expiring in November, 1890. It is customary to insure goods for one year, and the defendant's local agent, who was plaintiff's near neighbor, might be presumed to have known that the plaintiff was not likely to have any insurance on his merchandise

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expiring in July, 1890. The defendant's local agent solicited the insurance from plaintiff, and wrote out the application on which it was based, on June 9, 1890. That part of the application which was to be signed, and which was signed by the plaintiff, stated, "present insurance, $2,500," but did not state at what time such insurance or any part thereof expired. The plaintiff, however, testified that, when he signed the application, he told the defendant's local agent what insurance he had, and exhibited to him the policy for $1,000, expiring in November, stating that he would have that policy canceled as soon as he saw the insurance agent who controlled it. On the first of July, 1890, defendant's agent came into plaintiff's store with the policy in suit, and handed it to him, saying it was all right.

The plaintiff further testified that he had requested the defendant's local agent to explain to the defendant the circumstances, and that, when he received the policy, as aforesaid, he thought it was all right; that he was illiterate and unfamiliar with the English language, and that the defendant's local agent knew this fact; and that he never learned of the $1,000 limitation as to concurrent insurance until after the fire, which occurred on November 24, 1890, four months and twenty-four days after the delivery of the policy. The plaintiff caused the cancellation of the $1,000 policy in July, 1890, soon after he received the policy in suit, and renewed the policy for $1,500, which expired in August of that year. The defendant's policy, by its terms, was to take effect July 1, 1890, so that there is no controversy touching the fact, that from that date until some time hereafter the plaintiff carried $2,500 other insurance, which was concurrent with the insurance mentioned in the defendant's policy, and that such concurrent insurance at no date between July 1, 1890,

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and the date of the fire, was less than $1,500. This evidence and some additional evidence to the effect that the defendant's local agent knew, after the delivery of the policy, that plaintiff retained $1,500 additional insurance, constitute all the evidence of the plaintiff bearing on the question of reformation.

The defendant's local agent testified that, when he solicited the insurance from plaintiff, the latter told him that he had $2,500 insurance on the merchandise, $1,500 of which would expire in July, and would not be renewed. He denied that the policies were shown to him. He stated that, when he forwarded the plaintiff's application to the company for approval, he wrote on the back thereof, in the column for remarks of agents, the following statement: "Mr. Steinberg has two policies in German-American of New York; one for $1,500 expires July 1, and one for $1,000 that expires November, 1890."

This statement was shown upon the trial to have been indorsed on the original application (which is also produced before us for inspection). It is in the same handwriting and ink as the residue of the application, and the evidence admits of no reasonable doubt that it was upon the application when the defendant acted upon it in issuing the policy in suit. This fact is made more patent by the letter of defendant's agent to defendant, bearing date June 12, 1890, which the plaintiff offered in evidence, and which is as follows:

"SILEX, MO., 6-12, 1890.

"*Mr. H. M. Magill, General Agent.*

"DEAR SIR:—I have received the return application for more information.

"Attached is a diagram of lots in block B., town of Silex. You will see number 1 has frame one-story building. Numbers 2 and 3 are vacant; 4 and 5 are

one-story frame buildings; 6, 7 and 8, vacant; number 9 is the one Steinberg is in. The stock of goods is in frame one-story building, sixteen by sixty-six feet. There is a one-story frame building, sixteen by forty-eight, across west end of 10, 11 and 12. Stable on 13, and west of Steinberg's stock of goods about sixty feet.

"Another stable on lots 15 and 16, and seventy feet off. The building belongs to a widow lady, Mrs. Kimler, and Mr. Steinberg only rents.

"Mr. Steinberg is paying $2 per hundred for his insurance in the German-American of New York, but is expecting a less rate. He has two policies; one for $1,500 expires July 1, 1890, and he wants this one ready when that expires. Then he has one for $1,000, that expires some time in November next, and will want another $1,000, if everything is all right.

"Respectfully,

"THOMAS B. DUNCAN."

The original application, which has been produced before us, shows the diagram referred to in this letter sketched in pencil on the reverse side thereof, and also shows a pencil mark across the figures $2,500 on the face of the application, and the figures $1,000 written over it in pencil, which changes were presumably made at the defendant's main office, after the application was sent to it the second time.

Touching the powers of the defendant's local agent to bind the defendant by any representations made, the plaintiff offered no evidence. It appeared by the plaintiff's own evidence, however, that he knew that his application would have to be forwarded to the defendant's main office for approval, and that the local agent could not even give him the rates of insurance. The defendant put in evidence the certificate of appointment of the local agent in question, the material part of which read as follows:

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"CERTIFICATE OF APPOINTMENT.

"Branch for West and South of the Phœnix Insurance Company, Hartford, Connecticut.

"This is to certify that Thomas B. Duncan, of Silex, Lincoln county, and state of Missouri, is hereby duly considered and appointed surveyor of the Phœnix Insurance Company, of Hartford, Connecticut, during the pleasure of said company; and as such surveyor is duly authorized and empowered to receive proposals for insurance against loss or damage by fire, and to transact all business pertaining to said office, that shall be given him in charge by the general agent of said company at Cincinnati, Ohio."

It will be seen from the pleadings in this case that the plaintiff does not seek to recover on any theory of waiver or estoppel. Were such the fact his remedy would be at law, and not in equity. He could sue on the policy, and, if the defendant set up the concurrent insurance clause in defeasance of a right of recovery, he might avoid its effect by pleading in reply facts showing a waiver or estoppel. In that respect the case made by the pleadings herein is radically different from the case of *Hamilton v. Ins. Co.*, 94 Mo. 353, on which the plaintiff mainly relies, as that was an action at law in which a waiver was sought to be established. But this case is also radically different in the evidence from the other, because in the *Hamilton case* the agent, whose acts were relied on as constituting a waiver of a similar clause in a policy *previously* issued, was authorized to make contracts of insurance, and had himself effected the subsequent insurance, which was claimed to have worked an avoidance of the policy sued on; whereas here the agent is a mere soliciting agent, and whether he did or did not know of other existing insurance in excess of the permitted limit, is under the evidence reasonably doubtful. The plaintiff's right of

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reformation does not rest upon any theory of waiver, but upon a theory of mutual mistake. Before there can be a reformation of the policy, it must be established that both parties agreed to something different from what is expressed in the writing. The court cannot supply an agreement that was not made. *Tesson v. Ins. Co.*, 40 Mo. 33.

Now in the case at bar there is not a particle of evidence, that the contract made by the defendant is not the contract it intended to make. It is true that it was informed by the plaintiff's application that the insurance on the goods at the date of the application (June 8) was $2,500; but, since the application does not state at what time that insurance or any part thereof would expire, that statement is in no way opposed to the indorsement by the local agent on the reverse side of the application that $1,500 thereof would expire on the first day of July, when the defendant's policy would take effect, leaving only $1,000 insurance on the goods concurrent with that of defendant's insurance. The subsequent letter of June 12, written by the local agent and offered in evidence by the plaintiff himself, only corroborates that fact. Nor is there a particle of evidence in the case, that the contract of insurance was made with the local agent. All the testimony concedes that the local agent was not empowered to make any contract of insurance, and that the plaintiff was advised of the fact that his application would have to be submitted to the main office, and that the terms of the contract, including even the rate of insurance, would have to be determined there. Taking the most favorable view of the plaintiff's evidence standing alone, it makes out no mutual mistake, such as would entitle him to a reformation. It at best makes out a mistake on his own part, for which his remedy is rescission and not in reformation.

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In view of the foregoing it is needless to discuss the weight of the evidence, because that is directed to an immaterial point, although it is well settled that, in order to establish a contract in equity, contrary to the written terms of an instrument, the mistake must be made out by evidence which will strike the mind of the chancellor as free from reasonable doubt. *Forrester v. Scoville*, 51 Mo. 268; *Atkinson v. Henry*, 80 Mo. 157. The evidence in this case does not answer that requirement, even were it directed to a material point, which it clearly is not.

Nor can we see how the fact that the local agent told the plaintiff, when he delivered the policy, that it was all right (which fact is asserted by the plaintiff, and denied by the local agent), even if it were true, affects the question under consideration one way or the other. It was held in *American Ins. Co. v. Neiberger*, 74 Mo. 167, that it was the duty of the assured to examine the policy, and see whether it contained the contract he bargained for, and, where he retained it without objection for three months and fifteen days, even his right of rescission or cancellation was gone. Much less could he insist, under similar circumstances, upon a reformation after loss.

As to any question of waiver or estoppel arising upon the evidence, it suffices to say that a plaintiff cannot recover upon a theory of the case adverse to that upon which his petition proceeds, even if his evidence under other circumstances might authorize recovery on the adverse theory. *Stix v. Matthews*, 75 Mo. 96. That of itself, regardless of the character of the plaintiff's evidence, would debar him of recovery on a theory of waiver in this proceeding.

All the judges concurring, the judgment is reversed.

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E. A. MANSUR *et al.*, Appellants, v. J. B. MURPHY, Respondent.

St. Louis Court of Appeals, April 5, 1892.

Contracts: IMPLIED PROMISE. A promise cannot be implied contrary to the expressed intention of the party sought to be charged.

Appeal from the Texas Circuit Court.—HON. C. C. BLAND, Judge.

AFFIRMED.

V. M. Hines and *Argus Cox*, for appellants.

L. B. Woodside, for respondent.

ROMBAUER, P. J.—The conceded facts in this case may be briefly stated as follows: The plaintiffs and defendant shipped on the same train to Kansas City for sale one carload of hogs each. For convenience's sake the defendant accompanied the shipment. He sold both car lots to the same persons, advising the purchasers to whom each car lot belonged. The next day after the defendant's return, the vendees sent by mail to the plaintiffs their account sales. This account set out the account of the sale of each car lot separately, and was accompanied by a check on the American National Bank of Kansas City, payable to the order of the plaintiffs, for the aggregate net amount of the sales of both car lots. The check was drawn in that shape without the defendant's consent, and the defendant demanded of the plaintiffs his share of the money. The plaintiffs thereupon gave to the defendant, for his share of the sale, their own check on a bank in Springfield, where they kept their account, and also forwarded the

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check of the vendees to the same bank for collection. The defendant at once collected the check of the plaintiffs, but the check of the vendees was dishonored on presentation at the American National Bank of Kansas City, owing to the fact that the bank was temporarily in the hands of a bank examiner. This happened on January 20, 1891. The bank suspended payment for two months, and then resumed payment. The plaintiffs, upon learning of the suspension of the bank, demanded of the defendant the return of the money which he had collected on their check, and, upon his refusal to accede to the demand, they requested the defendant to join them in enforcing the collection of the check. The defendant refused to accede to the second request likewise. The plaintiffs thereupon collected the check by legal proceedings against the vendees, and incurred in so doing an expense for traveling expenses, attorneys' fees and loss of interest, aggregating $182.85. The present action is brought against the defendant, upon the theory of money had and received, to recover one-half of the expenses thus incurred. The above facts appearing by the petition and uncontroverted evidence, the court instructed the jury that the plaintiffs could not recover. The jury thereupon found the issues for the defendant. The plaintiffs assign this action of the court for error.

It was said by Judge SAVAGE, in *Mumford v. Brown*, 6 Cow. 475: "I know of no adjudication or principle by which one shall be compelled to pay another for services rendered without request or assent, expressed or implied." We referred to this case approvingly in our recent decision in *Eads v. Gaines*,* No. 5049, a case analogous in some respects to the case at bar, and both the supreme court and this court have

*The opinion here referred to has not been reported, a motion for rehearing having been sustained.

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repeatedly decided that no promise can be implied contrary to the expressed intention of the parties. The expenses incurred in this case by the plaintiffs were not incurred upon the defendant's request, and neither request nor promise to pay can be implied in the face of the uncontroverted fact that both were repudiated at the outset. It does not even appear that what the plaintiffs did was for the defendant's benefit, because the agreed facts concede that, if plaintiffs would have waited for two months, they could have collected the money without any outlay whatever.

The cases of *Mo. Pac. Ry. Co. v. McLiney*, 32 Mo. App. 176, and *Jacoby v. O'Hearn*, 32 Mo. App. 566, 571, relied on by the plaintiffs, have no application. The first is a case where a shipper, who had transferred his title in the merchandise shipped by assignment of a bill of lading with draft attached, collected the purchase money from the consignee without paying the draft. The second rests upon the doctrine of novation. In the case at bar the defendant received from the plaintiffs no more than was unquestionably due to him; he received pay from them, not for their property but for his own; the transaction was merely a convenient way of adjusting their accounts. That the money was paid under a mistake as to the solvency of the bank and drawer of the check, did not of itself constitute the plaintiffs agents of the defendant to enforce its collection by legal proceedings.

Whether the plaintiffs would have had any cause of action, in case they had sued the defendant at once upon his refusal to return to them the amount of their check, after the discovery of the dishonor of the vendees' check, we need not speculate upon. An action of that kind would have been governed by different principles from the present. We are clear that under the admitted facts of this case, an action for

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money paid to the defendant's use cannot be maintained, and that the court rightly instructed the jury that the plaintiffs could not recover.

The judgment is affirmed. All the judges concur.

THE STATE OF MISSOURI, Respondent, v. SHERMAN WILEY, Appellant.

St. Louis Court of Appeals, April 5, 1892.

The Record is examined and *held* not to show error.

Appeal from the Greene County Criminal Court.—HON. M. OLIVER, Judge.

AFFIRMED.

No briefs filed for appellant or respondent.

ROMBAUER, P. J.—This is a prosecution upon an information for petit larceny. The defendant was convicted and appealed, but whether to this court or to the supreme court is not quite clear upon the record. The transcript was sent to the supreme court, but that court, upon the motion of the attorney general, ordered its transfer to this court.

Neither party has filed any briefs in the cause, nor have any errors been assigned by appellant. As it is our duty in criminal cases to examine the record regardless of any assignment of errors, we have done so in this case and find no error in the record. The information is formally sufficient, the testimony amply substantiates the offense, and the instructions of the court, nearly all of which were given at defendant's request, are not subject to any objection.

All the judges concurring, the judgment is affirmed.

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The State of Missouri, Appellant, v. Joseph Murphy, Respondent.

St. Louis Court of Appeals, April 19, 1892.

1. **Criminal Law: informations running in name of state.** An information is not invalid, because it runs in the name of the state and the county in which it is filed. The name of the county will in such case be rejected as surplusage.

2. ——— : ——— : **charging the offense.** It will be sufficient for an information, in charging the offense, to follow the language of the statute in all cases wherein the statute individuates the offense. This rule is applied to an information charging a violation of section 3502 of the Revised Statutes, to-wit, the exhibition of a deadly weapon in a rude, angry and threatening manner, in the presence of one or more persons.'

Appeal from the Butler Circuit Court.—Hon. John G. Wear, Judge.

Reversed and remanded.

R. F. Scott, for appellant.

(1) The allegations in the information are in the language of the statute, and by the provisions of the same statute a pistol is a dangerous and deadly weapon, loaded or unloaded. R. S. 1889, sec. 3502; *State v. Hoffman*, 78 Mo. 256. If it is claimed that the information fails to allege that the pistol was loaded, hence was not dangerous; that is a matter to be determined by proof on trial, but is no objection to the information. *State v. Hall*, 20 Mo. App. 397; *State v. Smith*, 24 Mo. App. 413; *State v. Larkin*, 24 Mo. App. 410. The caption forms no part of the indictment. *State v. Freeman*, 21 Mo. 481; *State v. Daniels*, 66 Mo. 192; *State v. Blakely*, 83 Mo. 359. (2) The prosecution was conducted in the name of the state of Missouri, the words "county of Butler" being simply surplusage, did

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not prejudice the substantial rights of the defendant. R. S. 1889, sec. 4115; *State v. Waters*, 1 Mo. App. 7; *State v. Vanzandt*, 11 Mo. 541; *State v. England*, 19 Mo. 386. The information is good. The court erred in sustaining motion to quash.

No brief filed for respondent.

ROMBAUER, P. J.—The defendant was convicted before a justice of the peace upon an information filed against him by the prosecuting attorney under the provisions of section 3502 of the Revised Statutes of 1889, which, among other things, prohibits anyone from carrying concealed upon his person any kind of firearms, bowie-knife, dirk, dagger, slung shot or other deadly weapon, and provides that, "if any person shall, in the presence of one or more persons, exhibit any such weapon in a rude, angry or threatening manner," he shall, upon conviction, be punished by a fine or imprisonment or both.

The information filed against him was as follows:

"State of Missouri,
"County of Butler,
v.
"Joseph Murphy.

In the Justice Court before R. C. House, a Justice of the Peace for Poplar Bluff Township.

"R. F. Scott, prosecuting attorney within and for the county of Butler, in the state of Missouri, informs the court, on the complaint of Horace Brown, that Joseph Murphy, on or about the seventeenth day of May, 1891, at and in said county and state, did then and there unlawfully and wilfully exhibit in a rude, angry and threatening manner, and in the presence of one or more persons, a dangerous and deadly weapon, to-wit, a pistol, against the peace and dignity of the state.

R. F. SCOTT,
"Prosecuting Attorney."

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In the circuit court the defendant filed his motion to quash the information, stating as grounds of his motion that the information failed to charge the defendant with any offense as required by law, and was invalid because it did not run in the name of the state as required by the constitution and laws. This motion was sustained, and the court quashed the information and discharged the defendant. This is the error complained of by the state which appeals.

It will be seen that the charge, that the information does not run in the name of the state, is not true in point of fact. The words, county of Butler, are mere surplusage, and section 4115 of the Revised Statutes of 1889 provides that "no information shall be deemed invalid * * * for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged." In *State v. England*, 19 Mo. 388, it was held that, where the name of the state was entirely omitted in the body of the information, but was contained in the marginal statement of the venue, it was a sufficient compliance with the law.

Touching the second objection it will be seen that the information follows in its charging part the language of the statute. That is sufficient in all cases where the language of the statute individuates the offense. *State v. Walker*, 24 Mo. App. 679; *State v. Fare*, 39 Mo. App. 110; *State v. Brinkman*, 40 Mo. App. 284. Section 3502 of the statutes, under which this information was filed, creates a number of separate distinct offenses, of which the offense charged is one. *State v. Smith*, 24 Mo. App. 413. The motion to quash should have been overruled.

The judgment is reversed and the cause remanded. All the judges concur.

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PATRICK DONAHUE *et al.*, Respondents, v. WILLIAM C. BRAGG, Appellant.

St. Louis Court of Appeals, April 19, 1892.

1. **Pleading:** OBJECTION TO PARTIES BY ANSWER. *Held,* BIGGS, J., *dissenting,* that, in order to raise the objection that there is a misjoinder of parties plaintiff, an answer must in terms object to the action on that ground; it will not suffice that the answer states facts, showing that the alleged cause of action of plaintiffs, suing jointly, is not joint but several.

2. ——: WAIVER OF SUCH OBJECTION. A party cannot at the same time raise issues of law and of fact going to the entire pleading of the adverse party; by raising the issues of fact, he waives those of law. *Held,* accordingly, that a defendant has not the right at the same time to answer the petition of the plaintiff and to demur thereto for misjoinder of parties.

3. **Limitation of Actions:** ATTORNEY AND CLIENT. The statute of limitations begins to run in favor of an attorney on a claim for money collected by him for his client, when the client acquires knowledge of the collection.

Appeal from the St. Louis County Circuit Court.—HON. W. W. EDWARDS, Judge.

AFFIRMED.

William C. Bragg, for appellant.

Zach J. Mitchell, for respondents.

ROMBAUER, P. J.—This action is brought by the plaintiffs to recover from the defendant, who is an attorney-at-law, certain moneys belonging to them, which the defendant collected as agent of their former curatrix, Mary E. Donahue, and which he failed to pay over either to their curatrix or to them. On the trial of the cause by the court, without the intervention of a jury, there was a judgment for the plaintiffs. No

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instructions were asked or given, but the defendant, appealing, complains that the judgment is erroneous upon the record; that the court erred in not sustaining his demurrer for misjoinder of parties plaintiff, and that the verdict is excessive under the evidence.

In support of the first assignment of error, the defendant contends that it appears upon the face of the petition that the plaintiffs' causes of action are several and not joint; that he filed his demurrer to the petition, alleging that fact as a special ground of demurrer, as well as the fact that several causes of action are improperly joined in the same petition, and that such demurrer was erroneously overruled by the court. The defendant further contends that he saved the same exception by objecting to the evidence, and by motion for new trial and in arrest of judgment, and cannot be held to have waived the same in any manner. While the point made is technical, and does not affect the equitable merits of the controversy, yet, if well taken, it necessarily must lead to a reversal of the judgment, because it is an elementary proposition that parties having several rights against the same defendant cannot enforce them in a joint action against him, if he objects. On the other hand a defendant, who insists upon an error of this character, must show it clearly by the record; otherwise we must uphold the judgment of the trial court, on the general presumption which upholds the validity of its judgment.

The plaintiffs' petition is in the following words:

"Plaintiffs for this their petition against defendant, complaining, state that during the years 1882 and 1885, inclusive, they were minors, but are now adults; that, whilst such minors and during the years aforesaid, defendant as an alleged attorney and agent of one Mary E. Donahue, the then curatrix of the estate of the said several minors, at divers times during said

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years, collected of one Conant, of Ravenna, Ohio, divers large sums of money, to-wit, the sum in the aggregate of $1,900, and concealing the collection thereof from the said curatrix until long after her discharge as such, and until the —— day of ——, 1889, when plaintiffs had become adults as aforesaid, wrongfully converted the same to his own use, and wholly failed to pay the same or any part thereof to plaintiffs or to anyone else for and on their account, so that the same is still due and owing plaintiffs by defendant, and for which they pray judgment, with interest thereon from the wrongful conversion and concealment thereof as aforesaid."

While this petition is inartificially drawn, it certainly admits of the construction that the moneys collected by the defendant for the curatrix were moneys in which the present plaintiff had a joint, and not a several, interest. If, as the testimony tends to show, their interests in the moneys were several and not joint, the defendant should have moved to require the plaintiffs to make their petition more definite and certain on that point. If then it would have clearly appeared by their petition thus amended that their interests were several, the defendant could have demurred on that ground, and the overruling of his demurrer would have constituted reversible error. On the other hand, the defendant might have taken the objection by answer in the first instance by stating that the interests of the plaintiffs in such moneys were several and not joint, and that for that reason he objected to their being joined as parties plaintiff in the same petition, or, in other words, he might have demurred by answer. Instead of pursuing either course thus indicated, the defendant demurred to the petition for misjoinder of parties plaintiff and causes of action, and filed his answer in which he states facts which, he claims, show

that the interests of the plaintiffs in the funds were several, but in which he in no way *objects* to a misjoinder on that account. That such an answer is not sufficient to preserve the objection of misjoinder, we have decided in *Anderson v. McPike*, 41 Mo. App. 328, 331, to which ruling we must adhere. It results from the foregoing that the objection is not properly saved by demurrer, because the objectionable misjoinder does not appear on the face of the petition, and is not properly saved, by answer, because *no objection is made* by the answer on account of the misjoinder. Not being properly saved, it is necessarily waived, because, under our code and its construction by the court, by pleading over a party defendant waives every objection to the petition, except that it does not contain facts sufficient to constitute a cause of action, and that the court has no jurisdiction of the subject-matter of the action. R. S. 1889, sec. 2047; *Elfrank v. Seiler*, 54 Mo. 134; *Ryors v. Prior*, 31 Mo. App. 561.

There is, however, another technical objection which would preclude us from disturbing the judgment on the ground of error claimed to exist in the record proper. The record does show at what date the defendant's demurrer was filed, but fails to show at what date his answer was filed, and is entirely silent on the subject which of the two pleadings was filed first. For aught that the record shows, the defendant's answer might have been filed first in time, or might have been filed while the demurrer was pending and undetermined, and in either event the overruling of the demurrer would have been proper, because a party cannot at the same time raise issues both of law and fact going to the *entire pleading* of the adverse party, and, by raising issues of fact, necessarily waives issues of law. Our code does not permit of double pleading.

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This brings us to the substance of the controversy. Outside of the general objection to the admission of evidence on the ground that the petition states no cause of action, which objection was repeated from time to time, the bill of exceptions shows no objection to any evidence. The defendant was called as a witness for the plaintiffs, and testified that he had collected certain moneys belonging to the plaintiffs, for which he had partially accounted to the curatrix, but it also appeared by that evidence that he had not fully accounted. The main controversy was about the credits to which the defendant was entitled. The defendant testified that he had thus collected in all $1,714.60, out of which sum he had accounted, in cash payments and deduction for legal services, for the sum $870.44, leaving a balance of $944.16 unaccounted for, and that in one item of this collection, amounting to $323.90, the plaintiffs had only a three-fifths interest, leaving as the entire amount due to the plaintiffs, exclusive of interest, $814.60. On the other hand the curatrix testified that she never received from the defendant more than $450 in all; that she never had employed the defendant for any other services except those rendered for her in the probate court in St. Louis, for which the defendant in his testimony claimed $25. According to the testimony of the curatrix $1,239.60 remained unaccounted for. The dates of the collections were between November, 1883, and September, 1885. Judgment was rendered, October, 1891, for $1,638.38. Taking the evidence of the curatrix as a basis of finding, and computing on it interest for seven years at six per cent. per annum, a judgment for $1,749.98 would have been warranted.

Touching the credits claimed by the defendant, we may say that the curatrix was an illiterate person, and could not sign her name. The defendant produced certain receipts, purporting to have been assigned by

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her mark and attested by certain witnesses. The attesting witnesses were called by the defendant as witnesses on his behalf. Two of them denied that the attestation to receipts aggregating $414.05 were their signatures. The third admitted that an attestation to a receipt for $175 was in his handwriting, but stated that he saw no money paid, and was told that the attestation was a mere matter of form. The draft for $323.90, in which the defendant claimed the plaintiffs had only an interest of three-fifths, was payable to the curatrix in the same manner as all the other drafts which the defendant collected. It will be thus seen that the evidence was ample to support the finding in amount, and that defendant's complaint that the judgment is excessive is untenable, since, in the absence of instructions, we are not advised of the basis of computation adopted by the court.

The defendant in his answer pleaded the statute of limitations of five years as a defense in the following manner:

"Further answering defendant says that, at divers times during the years 1883 and 1885, he collected of one Conant, of Ravenna, Ohio, divers sums of money for one Mary Donahue, as curatrix of the several estates of Patrick Donahue, John Donahue and Susan Donahue, minors; that as and when he collected said several sums he duly notified the said Mary Donahue, curatrix as aforesaid, so that at said respective and several dates she had knowledge of said collections.

"That said Patrick Donahue reached his majority in January, 1886, John Donahue in September, 1888, and Susan Donahue in June, 1887.

"Wherefore, defendant says that, if by reason of the premises plaintiffs have any cause of action against the defendant, it did not accrue to them or any of them within five years of the commencement of this action."

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The present action was instituted the tenth day of April, 1891. In regard to this defense it will suffice to say that there is no satisfactory evidence in the record of the fact stated in the answer, "that as and when defendant collected said several sums he duly notified said Mary Donahue, curatrix, as aforesaid," or that she had knowledge of said collections. Nor is there any satisfactory evidence that any of the plaintiffs had knowledge of such collections, as far as the same were withheld, at any time prior to the institution of the suit. While the law unquestionably is that limitation begins to run in favor of an attorney on a claim for money collected for a client from the time of the latter's knowledge of the collection (*McClurg v. Hill*, 7 Mo. App. 579), the evidence should be clear and uncontroverted that the client had such knowledge to enable the defendant to invoke the statutory bar as a matter of law. In this case the evidence at bests tends to show that the curatrix knew that the defendant had collected *some money* for her wards. There is no direct evidence that she knew of the extent of the collections, or that they exceeded the amounts accounted for. As to the two last items collected exceeding $1,000 in amount, there is no evidence that she knew of the date or amount of the collections. Giving to the defendant the benefit of the most favorable construction of the statute in his behalf which the evidence admits of, yet we can find no error in the record on that question. As no instructions were asked or given, it does not appear whether the court found against his claim of limitation because it was not well taken in law or because it was unsupported by the facts. Nor does it appear that the court has erroneously applied the law to the conceded facts; as it is not conceded by the evidence that either the plaintiffs or their representatives had that knowledge of the date and amount of the collections made by

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the defendant, which is essential to the running of the statute.

It results from the foregoing that there is no error in the record warranting a reversal of the judgment. In that view all the judges concur. Judge BIGGS is of opinion that the rule established in *Anderson v. McPike*, *supra*, is too technical, and that a defendant sufficiently saves his exceptions for misjoinder of parties plaintiff by stating the facts constituting such misjoinder in the answer without objecting *in terms* to the misjoinder, while Judge THOMPSON and myself adhere to the opinion that the rule of pleading established in *Anderson v. McPike* is the correct rule. It will be seen, however, that, even if the objection would have been made by answer, the result would still remain the same, since the evidence in the case does not conclusively show that the right of the plaintiffs in the funds sued for was several and not joint, and, in the absence of such showing, the question was one of disputed fact, which should have been submitted to the jury for their finding under instructions. No instructions were asked in this case by either party.

The judgment is affirmed. All the judges concur.

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THE STATE OF MISSOURI to the use of C. W. THRASHER *et al.*, Appellant, v. JOHN HECKART *et al.*, Respondents.

St. Louis Court of Appeals, April 19, 1892.

1. **Assignment:** ATTACHMENT BONDS. Attachment bonds and claims arising under them are assignable.

2. **Corporation:** POWERS OF CORPORATE AGENTS. When the president and managing officer of a corporation assign a chose in action belonging to the corporation in payment of a corporate debt, his authority to make the assignment may be sustained by proof that the corporation

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held him out as possessing it, as where the corporation tacitly permitted a practice on his part to exercise the power to transfer corporate assets for such purposes without obtaining special authority from the board of directors.

Appeal from the Greene Circuit Court.

REVERSED AND REMANDED.

White & McCammon, for appellants.

(1) The court erred in excluding the assignment of the attachment bonds and thereupon instructing the jury to find for the defendants. Such obligations and the causes of action arising thereon are proper subjects of alienation. *State to use v. McHale*, 16 Mo. App. 478–482; *Snyder v. Railroad*, 86 Mo. 613. (2) The assignment was made by the president and general manager, and the secretary of the company. The trial court excluded it, apparently on the ground that the assignment was not authorized by the resolution of the board of directors. The power of an officer, such as president and general manager of a corporation, to make contracts of that kind may be shown by usage, and the authority of the board of directors may be shown by its acquiescence. 1 Morawetz on Corporations, sec. 509. "It may be established without reference to the official record of the proceedings of the board, by proof of the usage which the company has permitted to grow up." And such is the uniform doctrine of the authorities. 1 Waterman on Corporations, 330, 331, 334; *Phillips v. Campbell*, 43 N. Y. 271; *Martin v. Webb*, 110 U. S. 7; *Mining Co. v. Bank*, 104 U. S. 192; *Ten Broek v. Will*, 20 Mo. App. 19; 2 Morawetz on Private Corporations, sec. 590; *McKeman v. Lenzer*, 56 Cal. 61. In the present case the authority of the president and general manager were shown by the fact of his constant practice of exercising such authority with the knowledge of the

board of directors. (3) The court below erred in refusing to permit witnesses to answer questions which were directed to the existence of such usage, questions which would have elicited further information on that point.

Heffernan & Buckley, for respondents.

(1) Respondent denies that the court committed error in excluding the assignment of the bond in suit from the jury after the evidence of Williams, Cowan and Smith, constituting the board of directors of said company, was in, disclosing the fact that said assignment was without authority of said board; also denies the court committed error in directing the jury to find issues for respondent. (2) A sealed instrument to be transferred, and a transfer thereof under the corporation seal, although *prima facie* by the authority of the board of directors may be shown not to be, and when so shown the transfer is void. The court will take notice that all the directors testified this transfer was without authority of the board. *Musser v. Johnson*, 42 Mo. 74; Morawetz on Corporations, sec. 169; *Lovett v. Steam*, 6 Paige, 54. (3) The president or other officer cannot assign an asset or account belonging to a corporation so as to vest right of action in assignee, unless authorized by the board of directors, and they must act as a board and not individually. Morawetz on Private Corporations, secs. 168, 251; 1 Beach on Corporations, sec. 224; *Hyde v. Larkin*, 35 Mo. App. 365.

Rombauer, P. J.—This is a suit upon an attachment bond, given by the defendants to the Missouri Lumber Company. The plaintiffs claim as assignees of the lumber company. Upon the trial of the cause the court ruled out the written assignment offered in evidence by the plaintiffs, and instructed the jury to find

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for the defendants, which they did. This ruling of the court and incidental rulings bearing upon the validity of the assignment are assigned for error by the plaintiffs upon this appeal.

The plaintiffs were attorneys of the lumber company, and the bond in question was assigned to them in part payment of legal services rendered for that company. The assignment was executed by the president and general manager of the corporation in the name of the corporation, and attested by its corporate seal. On the other hand it was substantially conceded by the evidence that no direct action was ever had by the board of directors authorizing this assignment by vote, and that no minutes showing any authority on part of the president to make this assignment appear on the books of the corporation.

For the purpose of showing the authority of Williams to make this assignment by a usage of the corporation, the plaintiffs gave the evidence of Williams and the two other directors of the corporation, which tended to show that he had general authority to execute instruments of similar character; that he was in the habit of paying debts of the corporation by transferring acceptances and other evidence of indebtedness due to the corporation, and that his so doing was made matter of book account in the cash transactions of the company. One of the directors testified that Williams was the president, treasurer and general manager of the concern; that he managed its entire business, bought and sold lumber, drew and accepted drafts, and paid the debts of the corporation without any formal action on part of the board of directors. There was also evidence tending to show that he had assigned accounts due the corporation in payment of its debts. The plaintiffs endeavored to show by the testimony of Williams and these other directors that no objection was ever made

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on part of any member of the corporation to the action of Williams in these matters, but the court ruled out the evidence and the plaintiffs excepted and saved their exceptions. When the assignment was offered in evidence the court also rejected it, and plaintiffs saved their exceptions.

Under the statutes and decisions in this state, attachment bonds and claims arising thereon are assignable. All causes of action arising on contracts are assignable, and, under the last rulings of the supreme court, even causes of action arising in tort, if they be of a character which would survive and pass to the personal representative as assets. *Snyder v. Railroad*, 86 Mo. 616. The rights of the assignee in such cases are not greater than those of the assignor, and he is subject to all defenses which might have been made against his assignor, existing at the date of the assignment (*State to use v. McHale*, 16 Mo. App. 482); hence, the rights of the defendant are in no way prejudiced. In view of that state of the law it is evident that the trial court rejected the assignment offered in evidence on the sole ground that the plaintiffs had failed to show any authority in Williams to assign this particular claim of the corporation.

We held in *Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 72, that authority on part of the president and secretary to execute a deed for the corporation need not be affirmatively shown by a party claiming under the deed, but in absence of evidence to the contrary such authority is presumed. To the same effect is *Musser v. Johnson*, 42 Mo. 74. In *Bambrick v. Campbell*, 37 Mo. App. 460, we decided that the president being the legal head of the body corporate, when an act is performed by him the presumption will be indulged in that the act is legally done and binding upon the body. We there held that the written assign-

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ment of a special tax bill by the president of a quarry company, in the name of the corporation and under its seal, was *prima facie* valid. When presidents or other officers of corporations by custom exercise certain powers for the corporation, the custom has frequently been judicially recognized (1 Morawetz on Private Corporations, sec. 538), and in such cases, in absence of an express prohibition, the courts take judicial notice of the extent of the powers of certain corporate agents. In many cases, even where restrictions are imposed on corporate agents by the charter or by-laws of the corporation, the usage of the corporation may be such, that parties dealing in good faith with such agents cannot be affected by such restrictions. *First National Bank of Hannibal v. Coal Co.*, 86 Mo. 125.

The question, whether one has held out another as his agent possessing certain powers, where there is substantial evidence to that effect, is a question of fact and not of law, and there is no difference in that respect between corporations and natural persons. In *Hyde v. Larkin*, 35 Mo. App. 365, it was held that the assignment of an account due to a mining corporation by its president and general manager as security for money borrowed by him for the corporation could not be upheld in the absence of any evidence of corporate usage recognizing the authority of the president to borrow money or assign accounts, that being the only instance shown in which the president had ever done so. In the case at bar, however, the plaintiffs did give evidence of a practice on the part of the president to exercise similar powers in the assignment of corporate assets. It also appeared that his conduct in so doing was known to his codirectors, and that the account books of the corporation bore evidence of his actions. It was a question for the jury, under appropriate instructions, whether he was held out as a corporate

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agent invested with the power of making this assignment. The court, therefore, erred in withdrawing the question from their consideration. The court also erred in excluding evidence tending to show a course of conduct on part of the corporation, as all evidence bearing on that question was relevant.

The judgment is reversed and the cause remanded. All the judges concur.

J. B. NEGROTTO, Respondent, v. THE CITY OF MONETT, Appellant.

St. Louis Court of Appeals, April 19, 1892.

1. **Licensing Theatrical Performances:** STATUTORY LIMITATION OF POWER OF CITIES OF THE FOURTH CLASS. A city of the fourth class has no power to levy a license tax upon a theatrical performance, when held in an opera house within its limits, the prohibition of section 8193 of the Revised Statutes of 1889 being valid.

2. **Statutes:** REPUGNANCY. Repugnant statutes are such as cannot stand together; and *held*, accordingly, that two statutory provisions under consideration in this cause were not repugnant, since one was in the nature of a general provision, and the other served as a limitation or exception thereto.

Appeal from the Barry Circuit Court.—HON. JOSEPH CRAVENS, Judge.

AFFIRMED.

H. C. Pepper, *A. V. Darroch* and *H. Ward Hicks*, for appellant.

W. Cloud, for respondent.

ROMBAUER, P. J.—The trial court rendered a judgment for the plaintiff for $7.50 on the following agreed statement of facts, which was filed in the case in said court upon its appeal from a justice:

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"It is agreed and stipulated in the above-entitled cause that the facts are as follows: That the defendant was, on the —— day of ——, 1888, incorporated under the general laws of the state of Missouri as a city of the fourth class, and it has ever since been and is now organized and operated as a city of the fourth class, and is and always has been less than five thousand inhabitants.

"That defendant has now, and has for more than two years last past, a valid ordinance, which provided for the licensing and regulating shows and theatrical exhibitions, and fixing a license fee of $1.50 for each exhibition given by any show or theatrical performance in said city; that said ordinance declared it to be a misdemeanor for any person or persons to show or give theatrical exhibitions within the limits of said city without first procuring a license and paying the said fee or tax for the same, and ordinance fixed a penalty for any such violations; that the plaintiff, on the fourth, fifth, sixth, seventh, eighth and ninth nights of May, 1891, gave theatrical exhibitions or performances in an opera house within the limits of said city; that the marshal of said city demanded of plaintiff, as a license fee or tax, the sum of $7.50, being the amount required for five exhibitions or performances; that plaintiff first refused to pay anything for said exhibitions or performances. The marshal then threatened to arrest plaintiff for giving said exhibitions or performances in violation of said ordinance, as aforesaid, unless plaintiff pay the same. The plaintiff then paid to the said marshal the sum of $7.50 under protest, and in order to prevent the arrest so threatened, for the use and benefit of said city, and that said sum went into the city treasury; that plaintiff brought the above-entitled action to recover the said $7.50 of said city."

The defendant, appealing, assigns for error that

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the judgment is erroneous, because cities of the fourth class have power, under the provisions of section 1589 of the Revised Statutes of 1889, to provide by ordinance for licensing theatrical exhibitions, which power is in no way abridged by section 8193 of the same statutes, because the latter section was inserted by the revisers without any authority of law, and is repugnant to the provisions of the first, and because, in so doing, the revisers exceeded their power, and acted in disregard of section 6607 of the same statutes.

The various provisions of the statutes, which are thus brought up for review, are as follows:

"Sec. 1589. The mayor and board of aldermen (of cities of the fourth class) shall have power, by ordinance, * * * to provide for licensing and regulating * * * theatrical and other amusements * * * to the distance of one mile from the corporate limits of the city."

"Sec. 8193. No license or other tax shall be levied or collected by any county, village or city of the third or fourth class, or in cities under special charters, and having less than five thousand inhabitants, upon any theatrical or minstrel performance, when held in an opera house in any village or city of the third or fourth class, or in cities under special charters, and having less than five thousand inhabitants in this state."

"Sec. 6607. All acts or parts of acts of a general nature in force at the commencement of the present session of the general assembly, and not repealed, shall be, and the same are hereby, continued in full force and effect, unless the same be repugnant to the acts passed and revised at the present session."

The defendant contends that section 8193 is repugnant to the provisions of section 1589. That section 1589 was revised at the session of 1889, and section 8193 was not, and, hence, the latter is necessarily repealed

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by implication by the revision of the former. The vice of this agreement is twofold. First, it nowhere appears that either of the sections was or was not revised in 1889; on the contrary it would seem by a note of the revisers, attached to section 8194, that the revisers, finding both sections upon the statute books, enacted in 1879 and 1885, respectively, incorporated both into the revision of 1889, just as they found them. Next, there is no repugnancy whatever between the two sections. Repugnant provisions are such as cannot stand together. These two sections, however, can very well stand together, as section 8193 is a mere limitation, and not an abrogation of powers granted in section 1589. If section 1589 were made to read: "The mayor and board of aldermen shall have power by ordinance to provide for licensing and regulating theatrical and other amusements to the distance of one mile from the corporate limits of the city, *provided* that they are prohibited from levying any license or other tax on such amusements when held within an opera house within such city," could anyone claim that the proviso would be repugnant to the grant? The power to license such performances when held outside of an opera house still remains, as well as the power to regulate them wherever held.

It necessarily results from the foregoing that the judgment of the circuit court on the agreed facts was the right conclusion of law, and must be affirmed. It is so ordered. All the judges concur.

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HARRIETTE E. GREENLEE, Respondent, v. J. B. MARQUIS *et al.*, Appellants.

St. Louis Court of Appeals, April 19, 1892.

Fraudulent Conveyances: BONA FIDE PURCHASER FOR VALUE: NOTICE OF EQUITIES. The fact, that the vendee of property has given his negotiable promissory notes to the vendor for the purchase price, will not constitute him a *bona fide* purchaser for value so as to cut off the equities of a third person, if it appears that the vendee was notified of those equities while the notes were in the hands of the vendor. And *held*, in the course of discussion, that in such case the vendee can enjoin the negotiation of the notes, and if, in consequence of his failure to take steps in that direction, the notes are transferred to an innocent purchaser the vendee must suffer the loss.

Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

AFFIRMED.

Wm. O. Mead, for appellants.

There is no evidence in the case that the defendant Marquis had any knowledge of the fact that the satisfaction of the deed of trust as to lot 54 was entered by mistake, or of any fact calculated to put a prudent man upon inquiry as to why it was so entered; and where one or two innocent parties must suffer loss, as in this case, he through whose fraud, carelessness or mistake the loss occurs must suffer such loss. Therefore, the finding and judgment of the circuit court is for the wrong party. *Fowler v. Allen*, 7 L. R. A. 745; *Roote v. French*, 13 Wend. 570; *Cupples v. Whelan*, 61 Mo. 586; *Rice v. Coffman*, 56 Mo. 434. The plaintiff entered the satisfaction on the margin of the record of

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the deed of trust, and even though this was done by mistake injury would result to the defendant Marquis, should the judgment of the lower court be permitted to stand; and this was the cause of his making the purchase of the lot from the defendants Witt, and altering his condition. The plaintiff is estopped from asserting any claim under the deed of trust adverse to the interest of Marquis. *Acton v. Dooley*, 74 Mo. 67; *Sav. Ass'n v. Kehler*, 7 Mo. App. 158.

Heffernan & Buckley, for respondent.

In this case Witt was undoubtedly a fraudulent grantor, and while his grantee, Marquis, was not positively shown to have known or participated in the fraud at the time of the purchase, yet having paid no money but given notes, and having received notice of the fraud before the payment, the law is for plaintiff. For if a *bona fide* grantee receive notice of a fraud before payment, it is held, that he is not thereafter a *bona fide* purchaser for value, and giving security does not relieve him from his attitude. *Arnholt v. Hartwig*, 73 Mo. 485; *Dougherty v. Cooper*, 77 Mo. 528; *Young v. Keller*, 94 Mo. 581; *Conrad v. Fisher*, 37 Mo. App. 411. Where the vendor's object in making the sale is to defeat his creditors, three conditions must concur to protect the purchaser's title as against such creditors: *First.* He must buy without notice of the bad intent of the vendor. *Second.* He must be a purchaser for a valuable consideration. *Third.* He must have paid the purchase money before he had notice of the fraud, and, where the purchaser did not actually pay the purchase money before such notice, it is not sufficient that he had agreed upon the purchase before notice. *Check v. Waldron*, 39 Mo. App. 21; *Sexton v. Anderson*, 94 Mo. 373; *Garesche v. McDonald*, 103 Mo. 1.

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Rombauer, P. J.—This is an action to cancel an entry of an erroneous lease upon the margin of the record of a deed of trust in the records of deeds of Greene county, and to substitute in lieu thereof the entry which was in accordance with the intention of the parties. The trial court granted the relief prayed for, and the main contention of the defendants on this appeal is that the decree is not supported by the evidence.

The facts, as stated in plaintiff's petition, and as shown upon the trial by uncontroverted evidence, may be briefly stated as follows: The plaintiff held a deed of trust on lots 49 and 54 of the southern addition to Springfield. This deed was executed by the defendants Witt, who were husband and wife, on the twenty-ninth day of January, 1889, and secured an indebtedness of $1,000 due from them to the plaintiff. At that date the defendants Witt, having a chance to sell lot 49, requested the plaintiff to release that lot from the lien of the deed of trust, and the plaintiff consented to do so. For the purpose of doing so, the plaintiff called at the recorder's office, and by a mistake in the entry of release on the margin of the record she released the entire deed of trust. Neither of the parties was aware of this mistake until March, 1890, when the Witts desired to raise some money on lot 54 for the purpose of paying off the indebtedness of $1,000 still due to the plaintiff. They were then informed by an examiner of the title that there was no incumbrance on lot 54, and, learning of that fact, they immediately sold the lot to the defendant Marquis for a consideration of $1,700. *No part of this consideration was paid in cash*, but Marquis executed in payment thereof his three negotiable promissory notes to the Witts, the one first maturing being payable six months after date. Marquis was a young unmarried man without any means whatever,

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had been in Springfield but a short time, and left shortly thereafter, and this was the only purchase of real estate he ever made in that town. Although a witness in his own behalf, he failed to show how he came to buy this property, but simply stated that he bought it in good faith without knowledge of the plaintiff's alleged claim of mistake. Within a day after the deed of the Witts to Marquis was placed upon the records, the plaintiff learned of that fact, and her representatives called upon Marquis and informed him that the deed of trust had been released by mistake, that his grantors knew of that fact, and that the best thing he could do was to reconvey the property and redemand his notes, which he declined to do. The plaintiff thereupon instituted her present proceeding, and filed her notice of equitable lien under the provisions of section 6759, of the Revised Statutes of 1889, concerning the formal sufficiency of which no question is made in the record. There is no controversy whatever touching the point that the notes executed by Marquis to the Witts were in the possession of the latter, when Marquis was notified of the plaintiff's equitable claim on the property conveyed to him, and that they remained in their possession for many months thereafter. Marquis never took any steps whatever to regain his notes, or to set aside the transaction, but did rely throughout, as he does now, on his legal rights in the premises as a purchaser for value and in good faith. The defendants Witt are insolvent, and, unless plaintiff can re-establish her lien on lot 54, her debt is lost.

It is needless to say that, upon these facts, the two defendants Witt have no cause whatever to complain of the decree. As to them the mistake in the release is clearly established, and is in fact admitted by themselves. The plaintiff's right as against them is beyond any question, and whether or not they sold the property

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to Marquis for the purpose of paying plaintiff's claim out of the proceeds of the Marquis note or notes, is immaterial. The defendant Marquis seeks to vacate the decree on the principle recognized in our jurisprudence that, when one of two innocent parties must suffer by the acts of a third, he whose negligence has enabled the third party to occasion the loss should sustain it. *Rice v. Groffman*, 56 Mo. 434. This principle, however, can find no application in the present case. Conceding, for the purposes of argument, that Marquis bought the lot in good faith and without any notice of plaintiff's equitable lien, the testimony is clear that he had paid nothing on account of such purchase before he was fully advised of such lien by plaintiff's representatives, and by the notice of the equitable lien filed. It was decided in *Arnholt v. Hartwig*, 73 Mo. 485, that, in order to entitle the vendee of property transferred in fraud of the vendor's creditors, to be treated as a *bona fide* purchaser, it must appear that he actually paid the purchase money before he had any notice of the fraud. In equity a purchaser is protected to the extent of payments actually made by him, and no further. A purchaser without notice, to be entitled to protection, must be so not only at the time of the contract of conveyance but also at the time of the payment of the purchase money. *Wormley v. Wormley*, 8 Wheat. 449. Nor is the fact that the defendant Marquis executed his negotiable promissory notes to the Witts entitled to any consideration in view of the undisputed fact that, at the date when he was notified of the plaintiff's lien, said notes were not negotiated by the Witts, but were still in their possession. The defendant Marquis had the most unquestioned right at that date to enjoin the negotiation of the notes by the Witts, and had a perfect defense to the notes in the hands of the Witts, and, if he subsequently lost that defense because the notes

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were transferred before maturity to an innocent holder, it was the result of his own folly.

Nor is there any evidence in the record that the defendant Marquis ever attempted to get his notes back and to cancel the transaction of sale, a matter which he could have accomplished without any difficulty if the professions of fair dealing, which he and the Witts now make, are to be credited.

The judgment is affirmed. All the judges concur.

T. J. WHITLOCK, Appellant, v. D. D. APPLEBY *et al.*, Respondents.

St. Louis Court of Appeals, April 19, 1892.

1. **Practice, Appellate:** MATTERS OF FACT. In reviewing the judgment in an action at law, this court cannot treat a fact as established, when it is not conceded by the evidence nor found by the verdict.

2. **Res Adjudicata:** PREMATURE ACTION. *Held, arguendo,* that when a recovery on a note is defeated on the ground that the plaintiff has failed to supply a requisite consideration, the judgment will not debar his right of recovery in a subsequent action on the note, if such consideration is supplied by him after the rendition of the judgment; the first action will in such case be treated like one prematurely commenced.

Appeal from the Greene Circuit Court.

AFFIRMED.

Goode & Cravens, for appellant.

Hamlin & Hamlin, for respondents.

ROMBAUER, P. J.—This is a suit upon a promissory note for $300, brought by the payee against the maker and his sureties. The defense set up is the failure of consideration in this, that the said $300 represented

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the purchase price of a house and lot, for which the plaintiff agreed to make a deed to the defendant, and that he never made such deed. The plaintiff by reply denied that the consideration of the note was as stated in the defendant's answer, and furthermore stated that the note was given to the plaintiff as a balance due on a stock of goods and storehouse sold to the defendant by plaintiff. Upon the issues thus framed the cause was tried by a jury, the trial resulting in a verdict for the defendants.

The defendants introduced evidence tending to support the allegations of their answer. On cross-examination of the defendant maker, it appeared that he collected rent from the house, but it did not appear otherwise that he was in possession thereof, nor did it appear in any part of the case, except by conjecture, that he was in possession under plaintiff or had obtained possession from him under the contract of sale. The plaintiff introduced evidence tending to show that he never agreed to make a deed for the lot to the defendant maker; that he had no legal title to the lot, and the defendant knew it; and that he only agreed to procure a deed for the lot to the defendant from the true owner. The plaintiff also gave evidence tending to show that no separate valuation of the house and lot was made in the sale. This being in substance all the evidence, the court, upon the plaintiff's request, gave the following instructions: "1. The court instructs the jury that, unless they believe from the evidence that plaintiff, T. J. Whitlock, agreed to make a deed to the house and lot described in defendant's answer to the defendant, D. D. Appleby, as the consideration of defendant's note to said T. J. Whitlock, they will find the issue for the plaintiff.

"2. The court instructs the jury that the burden of proof in this case is on the defendants, and, unless

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the jury believe that the defendants have established their defense of failure of consideration by a preponderance of the testimony, you will find the issues for the plaintiff.

"3. The jury are instructed that, if they find the issues for the plaintiff, they will so state in their verdict, and assess his damages at three hundred and seventy dollars and ninety-five cents ($370.95)."

Upon the defendant's request the court instructed the jury as follows: "1. The court instructs the jury that it is admitted in this case that the plaintiff has not made to the defendant a deed to the property in controversy.

"2. The court instructs the jury that, if you believe from a preponderance of the evidence in this case that plaintiff sold to the defendant, D. D. Appleby, his interest in a stock of goods and a storehouse and lot situated at Huntsmill, for the price and sum of $1,400, and that plaintiff did, at the time of the sale, or subsequent to the sale, promise the defendant to make him a deed to this lot and house, and that in said sale said house and lot was put in to this defendant at $300 or more, and that the note in suit was given for the balance of said $1,400, and that that balance represented the money due on said house and lot, the goods having already been paid for, and that the plaintiff promised to make said deed, then you will find the issues in this case for the defendants."

The plaintiff now contends that the error in these instructions consisted in submitting to the jury an immaterial issue. It will be seen, however, that the instructions submitted to the jury the only issue that was made by the pleadings. It has always been the law of this state that it is error to submit to the jury an issue of fact, concerning which no allegation is made in the pleadings. The trial issues must be within the

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paper issues. *Fulkerson v. Thornton*, 68 Mo. 468; *Kenney v. Railroad*, 70 Mo. 252; *Melvin v. Railroad*, 89 Mo. 106; *Rothschild v. Frensdorf*, 21 Mo. App. 318.

The argument of the plaintiff, that the issues submitted were immaterial, rests upon the propositions decided in *Smith v. Busby*, 15 Mo. 387, and *Harvey v. Morris*, 63 Mo. 475, that, regardless of the fact whether plaintiff agreed to make a deed or not, defendant cannot resist the payment of the purchase money while he retains the possession of the property which he acquired of the plaintiff. The vice of this argument consists in the fact, that no such issue is made in the pleadings; nor does it even conclusively appear from the defendant's evidence that he acquired possession from the plaintiff, and, outside of the defendant's statement that he collected rent from the property, there is even no evidence that he ever was in possession of the property, much less that he was in possession under the plaintiff. Even if the issues had been made by the pleadings, we could not reverse a judgment upon the facts, unless it appeared that upon conceded facts the judgment was erroneous as a matter of law. If the plaintiff had sought a recovery on the theory, that the defendant went into possession under him, and under the contract of sale, and still retains the possession, and there were evidence tending to show these facts, he would have been bound to submit the evidence to the jury by instructions, before he could claim reversible error. Had the plaintiff by reply tendered the issue, that the defendant could not defend against the note while he retained possession of the property, which the plaintiff had delivered to him as consideration for the note, the defendant might have shown in avoidance that he was not in possession of the property at all, or in possession under some one else, or he might have surrendered the possession, and thus defeated a recovery of the purchase money.

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The further point is made by the plaintiff that, if the present judgment is permitted to stand, the defendant will retain possession of the property, which forms the consideration of the note, without paying anything to plaintiff therefor in return. This argument is based on the erroneous conception that the evidence concedes that the defendant retains a possession which he has acquired from the plaintiff. That such is not the fact, we have shown above. That there is some testimony tending inferentially to show that fact we concede, but that only shows that the verdict may lead to inequitable results, and not that error has intervened in the trial of the cause. We can reverse judgments for legal errors only, and cannot reverse them because there is a probability that they are unjust in their results. But the plaintiff's fears are in other respects groundless. A former judgment constitutes no defense to a cause of action accruing between the same parties and upon the same subject-matter *after its rendition*. All that the jury found is that plaintiff agreed to give defendant a deed, and that there was a failure of consideration of the note *on that account* at the last trial. That consideration, as the evidence shows, the plaintiff is still at liberty to supply, and the judgment does not stand in the way of his recovery *after he has supplied it*. The case is the same in principle as that of a failure of recovery upon an unmatured demand. A judgment in such a suit is no bar to a recovery upon the demand after its maturity. Wells on Res Adjudicata, sec. 454; *McFarlane v. Cushman*, 21 Wis. 401; *Crabtree v. Welles*, 19 Ill. 55. All that the plaintiff has to do is to procure and deliver the deed in question, and having done so, he may still enforce his note.

All the judges concurring, the judgment is affirmed. It is so ordered.

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THE STATE OF MISSOURI, Respondent, v. JAMES A. CASSITY, Appellant.

St. Louis Court of Appeals, April 19, 1892.

Criminal Law: INDICTMENT: SALE OF LIQUOR BY DRUGGIST. An indictment against a druggist, under section 4621 of the Revised Statutes of 1889, for selling liquor without the prescription of a duly registered physician, is fatally defective even after verdict, if it fails to state the name of the person to whom the liquor was sold.

Appeal from the Barry Circuit Court.—HON. JOSEPH CRAVENS, Judge.

REVERSED AND REMANDED.

N. Gibbs and *McPherson & Bro.*, for appellant.

The indictment is bad, because it does not set out the name of the person to whom the alleged illegal sale of the intoxicating liquor was made by the defendant as a registered druggist and pharmacist. The indictment, therefore, fails in certainty, and will not bar a second prosecution, nor can an intelligent defense be made by a druggist to such a charge. *State v. Martin,* 44 Mo. App. 45.

Joseph French, Prosecuting Attorney, for respondent.

ROMBAUER, P. J.—The defendant was indicted in *Lawrence county* for selling liquor as druggist and pharmacist without prescription of a duly registered physician. The indictment contained two counts, one charging the defendant as a druggist, and the other charging him as a pharmacist, under the provisions of

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section 4621 of the Revised Statutes of 1889. The punishment in either case is the same, and consists of a fine of not less than $100 nor more than $500. The defendant was convicted in *Barry county*, to which the cause had been removed by change of venue, the jury bringing in a general verdict of guilty, and assessing his punishment at a fine of $100. The defendant filed his motion in arrest of judgment, alleging as grounds thereof, that the indictment does not charge any offense against the laws of the state, and that the verdict is insufficient to support a judgment. He now urges these two grounds for reversal of the judgment.

The indictment does not in either count state the name of the person to whom the liquor was sold. We held in *State v. Martin*, 44 Mo. App. 45, that an information against a druggist under section 4621 of the statutes, which fails to state the name of the person to whom the liquor was sold by him, is subject to be quashed on the defendant's motion. We held this on the ground that in the case of a sale the druggist must rest his defense, if he has any, upon a prescription or prescriptions issued by a regularly registered physician of the state, and, if the purchaser of the liquor is not named in the indictment, that defense becomes practically unavailable to him. That view was approved by the supreme court, to which we certified the case for its final determination, in an opinion filed February 2, 1892, but not yet reported. It results from this that an indictment or information against a druggist, which fails to state the name of the purchaser, is bad even after verdict, because the statute of criminal jeofails (R. S. 1889, sec. 4115) expressly provides that nothing therein "shall be so construed as to render valid any indictment which does not *fully inform* the defendant of the offense of which he stands charged," and this indictment is fatally defective in failing to do so. The

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case is not one of variance, but one of an omission of an essential averment, and such omission has always been held fatal, and not cured either by the evidence or statute. *Wheat v. State*, 6 Mo. 455; *State v. Welch*, 28 Mo. 600; *State v. Hogan*, 31 Mo. 340; *State v. Wacker*, 16 Mo. App. 417. The motion in arrest should have been sustained.

The judgment is reversed and the cause remanded to the trial court, with directions to sustain the motion in arrest. The prosecuting attorney of Lawrence county may then proceed, under the provisions of section 4002 of the Revised Statutes of 1889, if so advised. All the judges concurring, it is so ordered.

THE STATE OF MISSOURI, Respondent, v. JAMES CASSITY, Appellant.

St. Louis Court of Appeals, April 19, 1892.

The Ruling in *State v. Cassity, ante*, p. 300, is applied in this action.

Appeal from the Barry Circuit Court.—HON. JOSEPH CRAVENS, Judge.

REVERSED AND REMANDED.

N. Gibbs and *McPherson & Bro.*, for appellant.

Joseph French, Prosecuting Attorney, for respondent.

BIGGS, J.—The defendant was indicted in the Lawrence county circuit court for the unlawful sale of intoxicating liquors. There was a change of venue to the circuit court of Barry county, where on a trial

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the defendant was found guilty, and his punishment assessed by the jury at a fine of $100.

The indictment contained three counts, the first charging the defendant as a druggist; the second charging him as a pharmacist (R. S. 1889, sec. 4621), and the third charging the sale of liquors without a dramshop license. R. S. 1889, sec. 4570. It is apparent that only one offense was intended to be charged. The three counts were added to meet any possible phase of the evidence.

The evidence introduced by the state tended to prove that the defendant was a druggist and registered pharmacist, and, at or about the time stated in the several counts, he sold to one Roberts intoxicating liquors without a written prescription, etc. The jury was instructed only as to the law governing the sale of intoxicants by druggists and pharmacists. No attempt was made to convict the defendant under the last count. It seems to have been ignored both by the court and counsel. The jury failed to specify in the verdict on which count the conviction was had. The court refused to grant a new trial or to arrest the judgment, and the defendant has brought the case here by appeal.

The record in this case and that in state against the same defendant, *ante*, p. 300, are the same, excepting the additional count in this case which charges a violation of the dramshop law. For the reason stated in our opinion in that case we must hold that the court committed error in overruling the defendant's motion in arrest of judgment. The first and second counts in the indictment are fatally defective, because each failed to state to whom the liquor was sold. The fact that there was one good count in the indictment cannot aid the judgment (*State v. Pitts*, 58 Mo. 556), for the reason that the evidence and the instructions were directed to the first and second counts only, making the conclusion

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unavoidable that the conviction was had under one or the other of those counts. We must, therefore, reverse the judgment.

On a retrial of the case the defendant may be tried under the last count, but, if this course be pursued, the other counts will have to be dismissed.

With the concurrence of the other judges, the judgment of the circuit court will be reversed, and the cause remanded. All the judges concur.

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J. H. Duke, Respondent, v. Charles Compton *et al.*, Appellants.

St. Louis Court of Appeals, April 19, 1892.

1. **Landlord and Tenant:** STATUTORY REMEDIES FOR RECOVERY OF POSSESSION ON DEFAULT IN PAYMENT OF RENT. The remedies provided by sections 6392 and 6397 of the Revised Statutes, 1889, for the recovery of the possession of the rented premises from the tenant for nonpayment of rent are different and distinct. Under the former section the possession of the premises and the rent in default can be recovered; under the latter the possession only. The remedy under the former section can only be invoked when the relation of landlord and tenant exists, and, therefore, a purchaser from the landlord cannot invoke it, unless the tenant has attorned to him; but such purchaser can proceed under the latter section without such attornment.

2. ——— : ———: CHANGE FROM ONE REMEDY TO THE OTHER. A purchaser from the landlord cannot institute an action under said section 6397, and prove a cause of action and recover under said section 6392.

3. ———:———: EXHIBITION OF DEED BY PURCHASER FROM LANDLORD TO TENANT. In order to entitle a purchaser of the rented premises from the landlord to the recovery of those premises from the tenant under said section 6397 he must have a deed for the premises, regularly acknowledged, from the landlord. The possession by him, and exhibition by him to the tenant, of a title bond from the landlord for the premises will not suffice.

4. **Vendor and Vendee:** ACCEPTANCE OF OFFER OF SALE. A binding contract or sale does not result, where the owner of land made an offer to sell it, and the person to whom it is made does not accept it without change or qualification, but attaches to his acceptance a condition which is refused by the owner.

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Appeal from the Howell Circuit Court.—HON. W. N. EVANS, Judge.

REVERSED.

Jones, Olden & Orr, for appellants.

Section 6397, Revised Statutes, 1889, does not authorize a judgment for rent either in the justice's court or the circuit court. *Green v. Steinberg,* 15 Mo. App. 32; R. S. 1889, sec. 6399. The court very properly held that, since the plaintiff did not bring himself within the provisions of section 6399, *supra,* by showing that he was a purchaser of defendant's landlord by a "deed regularly acknowledged," he was not entitled to recover possession.

N. B. Wilkinson, for respondent

Defendants having attorned to plaintiff and agreed to pay him rent, this case is governed by section 6391, *et seq.*, Revised Statutes, 1889. The finding of facts by the lower court, sitting without a jury, will not be disturbed by the appellate court. *Handlan v. McManus,* 100 Mo. 124.

BIGGS, J.—This action originated before a justice of the peace. The complaint, omitting the caption, is as follows: "Joseph H. Duke, the petitioner above named, for his cause of action alleges that, on or about the fifteenth day of April, 1891, J. T. Gipson was the owner of lot 19 in block 7 of the original plat of Willow Springs, in Howell county and state of Missouri, and the buildings situate thereon, and that, on the fifteenth day of April, 1891, said J. T. Gipson leased said lot and the buildings thereon to the above-named defendants for the term of one month at the rental of $5 per month,

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payable monthly in advance, and that said defendants thereafter entered into the possession of said described premises, and have all the time since occupied them.

"That, on the twenty-fourth day of July, 1891, he purchased said described premises by a written contract of purchase from said J. T. Gipson, and is now, and has been since said date, the sole owner of said above-described premises, and entitled to all the rents for same.

"Plaintiff further alleges that, on the fifteenth day of August, 1891, at which time the rent for the succeeding month was due and payable, he personally demanded of said defendants, and each of them, that they pay the rent then due and payable, to-wit, the sum of $5, and at the same time exhibited to said defendants his written contract of purchase of said described premises from said J. T. Gipson, but that said defendants refused, and still refuse, to pay said rent.

"For the reasons herein set forth, your petitioner demands that the restoration of said premises be made to him, and that he have judgment for his costs."

The petition was duly verified. On affidavit of the defendants, the case was certified to the circuit court of Howell county under section 6219, Revised Statutes, 1889, where it was tried before the court sitting as a jury. The court was of the opinion that the plaintiff was not entitled to a judgment for the possession of the property, but *was* entitled to a judgment for past due rent, and judgment was entered accordingly. The defendants have appealed.

It is claimed by the defendants' counsel that the judgment entered by the court was not authorized by the pleadings and evidence. The determination of this question is the only matter which we need consider.

It is conceded that Gipson owned the property on the fifteenth of April, 1891, and that on that day he

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rented it to defendants by the month, rent payable in advance. The plaintiff claimed, and his evidence tended to prove, that his negotiations for the purchase of the property, which culminated in the execution and delivery of a title bond by Gipson on the twenty-fourth day of July, 1891, commenced with Gipson's agent at Willow Springs about the fifteenth day of May; that, at the last-mentioned date, he agreed with the agent as to the terms of sale, paid him $10 on the purchase and took his receipt therefor; that, afterwards, about the fifteenth day of June, he had a talk with the defendant, Charles Compton, who still held the possession of the property, concerning it. This conversation was thus detailed by the plaintiff: "The morning of fifteenth (June) he (Compton) came and wanted to rent it the balance of the month. He said he was about to get another building there, and as soon as the building was done he would move. I told him I could not rent it for $5 a month, and said you will have to pay $12. He agreed to pay at that rate. After the conversation be said he would get out by the first of July, if he had to move into the street or to the barn. I said there was no occasion for that." On account of the change of residence by Gipson, who was a non-resident, he was not advised of the negotiations between the plaintiff and his agent for some time thereafter. When the matter was finally closed by the execution of a title bond the plaintiff exhibited it to the defendants and demanded possession of the property, which was refused. This was the substance of the plaintiff's evidence.

The defendants read in evidence some correspondence between them and Gipson, antedating the title bond, which correspondence, they claimed, constituted a valid contract of purchase of the property from Gipson. Their defense to the plaintiff's suit was that

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he had no deed to the property, and that they no longer occupied the property as tenants, but as purchasers. The defendants also read in evidence a notice served on the defendants by the plaintiff notifying them of the purchase, and requiring them to deliver the possession of the property to him on September 15, 1891.

It is evident from the judgment itself and the instructions that the circuit court treated the action as one under section 6392, instead of 6397, Revised Statutes, 1889. Under section 6392 there may be a recovery in one action for both possession and rent, but, to sustain the action, the plaintiff must occupy the position of landlord as to the demised premises. If he is a purchaser from the landlord he must aver and prove that the tenant in possession has attorned to him, thereby establishing the relation of landlord and tenant between them. In no other way can rent be recovered as such under this section of the statute.

Section 6392 reads: "Whenever any rent has become due and payable, and payment has been demanded by the *landlord or his agent* from the lessee or person occupying the premises, and payment thereof has not been made, the *landlord* or his agent may file a statement, verified by affidavit with any justice of the peace in the county in which the property is situated, or, if the same shall be in a city having over one hundred thousand inhabitants, then with a justice of the peace of the ward or district in which the property is situated, and in which such justice shall have been elected or appointed, setting forth the terms on which said property was rented, and the amount of rent actually due to such *landlord;* that the same has been demanded from the tenant, lessee or person occupying the premises, and that payment has not been made, and particularly describing the property rented or leased; and thereupon such justice shall issue a summons

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directed to such tenant or lessee and to all persons occupying the premises, by name, requiring them to appear before him upon a day to be therein named, and show cause why possession of the property should not be restored to the plaintiff," etc.

Section 6394 reads: "Upon the return of the summons executed the justice shall proceed to hear the cause; and if it shall appear that the rent which is due has been demanded of the tenant, lessee or persons occupying the property, and that payment has not been made, and if the payment of such rent, with all costs, shall not be tendered before the justice on the hearing of said cause, the justice shall render judgment that the landlord recover the possession of the premises so rented or leased, and also his debt for the amount of the rent then due, with all costs," etc.

The action provided for by section 6397 is one for possession *only*. *Green v. Steinberg*, 15 Mo. App. 32. This and the two succeeding sections afford a purchaser of demised premises, who holds a deed, a summary action for possession against the tenant, where the latter, upon exhibition of the deed, has refused to pay rent. This is the full extent of the remedy. There can be no recovery for rent. The sections of the statute referred to read:

"Sec. 6397. If any person purchase lands or tenements occupied at the time of such purchase by any tenant, lessee or sublessee, who shall, at any time thereafter, fail to pay rent to such purchaser, the person purchasing such property shall have the right, upon such failure, to commence proceedings before a justice of the peace to recover *possession*, as above provided.

"Sec. 6398. Before such proceedings are commenced the plaintiff or his agent shall make a demand of rent, as provided, and, at the time of making the

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demand, shall exhibit to the tenant or person in possession of the premises the *deed* under which he claims title, and if payment be then refused, the owner may commence his action as aforesaid.

"Sec. 6399. It shall be sufficient for such person to file his complaint, verified by affidavit, stating by whom the premises were leased, and the terms of such lease or renting, and how he claims title to the same; and upon the trial of the cause, if the plaintiff show that the party in possession, or those under whom he claims, rented or leased from a party claiming title to the premises by deed, and that the plaintiff has acquired the title of the original lessor by a *deed* or *deeds, regularly acknowledged,* he shall be entitled to recover possession."

Now it is quite clear that the plaintiff intended to state a cause for action under section 6397. The averments bring the case under that section, and no other. The prayer for judgment is in accordance with it. If the pleading had been drawn under section 6392, it would have been necessary to have averred facts from which the relation of landlord and tenant could have been inferred, and also the amount of rent due and unpaid ought to have been stated. Treating the action as one under section 6397, the plaintiff's evidence failed to make out a case because it showed he only had a title bond from Gipson. To entitle him to the remedy afforded by the section it was necessary for him to have had a deed, regularly acknowledged. Why the legislature deemed it necessary to confine the remedy to purchasers having deeds is no concern of ours. The law is so written, and the courts must obey it. The plaintiff having failed in his proof in this respect, it was not permissible for him to shift his position and undertake to make a case under section 6392. The two actions are separate and distinct; they require different

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averments and different proof, and a plaintiff cannot recover under the one section or the other as his evidence may warrant. Hence the plaintiff's evidence, tending to show that the defendants recognized him as their landlord, and agreed to hold thereafter under him, was entirely irrelevant and foreign to the issues, and in no way helped the plaintiff out of the dilemma. We, therefore, conclude that the action was improvidently brought, and that it cannot be maintained.

Concerning the second defense we need only to say that in our opinion the evidence introduced by the defendants to prove a prior contract of purchase by them is insufficient. Gipson's letter to them, containing the proposals and terms of sale, called for notes bearing ten-per-cent. interest. Instead of accepting the proposition, without change or qualification, they tendered notes bearing eight-per-cent. interest, and also attached a condition that Gipson should be responsible for the shelving which had been removed from the storeroom. This did not amount to an acceptance, but was a counter-proposition, which the evidence shows Gipson promptly rejected.

With the concurrence of the other judges the judgment of the circuit court will be reversed. It is so ordered.

THE STATE OF MISSOURI, Respondent, v. A. J. CAUGHRON, Appellant.

St. Louis Court of Appeals, April 19, 1892.

Practice, Appellate: PAYMENT ON DOCKET FEE IN CRIMINAL CASE. A defendant in a criminal case, who appeals to this court, must pay the docket fee; in case of his failure to do so his appeal may be dismissed.

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Appeal from the Ripley Circuit Court.—Hon. John G. Wear, Judge.

Appeal dismissed.

No brief filed for appellant.

No brief filed for respondent.

Biggs, J.—The defendant was indicted, tried and convicted of a misdemeanor, at the October term, 1890, of the circuit court of Ripley county. An appeal was granted at the same term. The clerk of the circuit court transmitted the record to the clerk of this court, but it was not filed, or the case docketed, by reason of the defendant's failure to pay the docket fee in this court. On the nineteenth of February, 1892, the prosecuting attorney of the county paid the docket fee, and he now asks that the defendant's appeal be dismissed.

The statute makes it our duty to examine the record in a criminal case, although the defendant has failed to assign error, or file briefs, but we know of no law which exempts him from paying the docket fee.

The plaintiff's motion to dismiss the appeal will be sustained, and an order of dismissal entered. All the judges concur.

Frances Craig, Administratrix of Estate of Norval Craig, Deceased, Plaintiff in Error, v. William Kelly *et al.*, Defendants in Error.

St. Louis Court of Appeals, April 19, 1892.

1. **Practice, Appellate**: non-prejudicial error: expression of opinion by trial judge. At the close of the evidence in this cause, the trial judge expressed an opinion, unfavorable to the appellant, of

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the legal effect of certain evidence; but immediately thereafter, and after an examination of the authorities, he stated in open court that the opinion which he had expressed was erroneous; he also gave an instruction to the jury correctly stating the law upon the subject. *Held*, that this expression of opinion did not constitute prejudicial error.

2. ———: WEIGHING THE EVIDENCE IN ACTION AT LAW. This court is concluded by the finding of the jury on an issue of fact in an action at law, when the finding is supported by reasonable and fair inferences which are authorized by the evidence.

Error to the Hannibal Court of Common Pleas.—HON. THOS. H. BACON, Judge.

AFFIRMED.

John L. RoBards, for plaintiff in error.

Harrison & Mahan, for defendants in error.

BIGGS, J.—This action is on a promissory note, and was instituted on August 6, 1891, against William Kelly and John Chamberlain, since deceased. The note reads:

"$500. HANNIBAL, MO., December 12, 1872.

"One day after date we promise to pay to N. Craig, or order, $500, value received, with interest from date at the rate of ten per cent. per annum, negotiable and payable without discount or defalcation.

"(Signed) W. J. MARSH,
"N. B. DONLEY,
"W. S. SHANNON,
"W. P. CARSTARPHEN,
"W. R. KELLY,
"J. CHAMBERLAIN."

On the back of the note are the following indorsements:

"$150 credit on within note (one hundred and fifty dollars), July 28, 1874.'

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"May 15, 1876, received on the within $12.
"Received on the within $20, November 1, 1876.
"Credit on within note $30, this November 8, 1876.
"Received on the within $5, June 10, 1878.
"Received on within note $10, August 24, 1878.
"Received on within $10, October 2, 1878.
"Received $15, April 13, 1880.
"Paid on the within note $30, May 18, 1881.
"Received $35, December 14, 1882.
"May 26, 1883, credit on within note $20.
"Received $2, May 1, 1887."

The answer of the defendants contained a general denial and the plea of the statute of limitations. After the trial of the cause below, but prior to the submission in this court, John Chamberlain died, and his administratrix was substituted as a party defendant. There was a verdict and judgment for the defendant, and the plaintiff has appealed.

The plaintiff's assignments of error are: *First.* That the trial judge expressed in the presence of the jury an erroneous opinion concerning a legal question which was decisive of the case, by reason of which the plaintiff was prejudiced. *Second.* That the instructions are erroneous and misleading. *Third.* That the evidence affords no basis for the finding of the jury.

I. There was evidence tending to prove, and it seems to be conceded now, that N. B. Donley was the principal in the note, and that the other signers were his sureties. The plaintiff's evidence tended to establish that the payments were made by Donley. At the close of the plaintiff's evidence the judge remarked that it was his opinion that a partial payment on a note by the principal, after the expiration of the original limitation, would not, so far as the surety was concerned (if the payment was without his consent), create a new period of limitation. Immediately afterwards, the judge

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after an examination of the authorities, stated in open court that the view expressed by him was wrong. This is the matter complained of. We cannot conceive how the plaintiff could have been prejudiced, especially when the court's instructions are considered. In the second instruction the jury was told that "a payment on a note, if made by one comaker at any time within ten years after its maturity, operates as a new promise by all, of date of said part payment, and running for another ten years; pending which new period of ten years another payment by one comaker will again operate as another new promise by all, of date of such other part payment, and running for another ten years; and, if from the evidence the jury finds that such part payments were so in such times made by any one comaker on said note, the jury will find that said note is not barred by the statute of limitations." This instruction plainly declared the law, and no jury of any intelligence could have been led to discard it by reason of the colloquy between court and counsel. It seems to us that the matter complained of had a tendency to impress the minds of the jury with the correct view, rather than to confuse them on the subject, as contended by the plaintiff's counsel. What was said by the court during the trial cannot be regarded as an oral instruction; hence, the authorities cited have no application. We will have to overrule this assignment.

II. The objection made to the instructions relates to the fourth. This instruction reads: "If, under the evidence and instructions herein, the jury find that the limitation on said note had not expired at the time of the alleged credits of May 18, 1881, or May 1, 1887, either or both, then the question whether said payments were made, either or both, is for the determination of the jury on the evidence in the case."

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The evidence tended to show that the credits referred to in the instruction were indorsed by Mr. Craig, the payee. There was no other evidence on the subject. The plaintiff insists that the indorsements alone are *prima facie* evidence that payments were actually made on the note at the dates of the indorsements, and that, therefore, in the absence of proof to the contrary, the instruction of the court was wrong. When it is established that the indorsement of a credit on a note was made before the expiration of the period of limitation, the indorsement itself furnished evidence of payment, Dr. Greenleaf, in his work on evidence (1 Greenleaf on Evidence, sec. 121), says that, in the absence of opposing circumstances, the date of such an indorsement will be inferred from its face. But the Kansas City Court of Appeals in the case of *Haver v. Schwyhart*, 39 Mo. App. 303, denies this rule. The court said: "But is the indorsement alone evidence that the payment was made at the time stated in the indorsement? We think not. There should be other evidence showing that the indorsement was entered on the note at the time it purports to have been." Now, if we adopt the latter view, then the instruction was prejudicial to the *defendant* instead of to the plaintiff, because the only evidence was that the indorsements were in the handwriting of the payee. Therefore, the court should have instructed that there was no sufficient evidence of these payments. But, if the other view be adopted, then the instruction was not prejudicial to the plaintiff, because there were circumstances which had a tendency to refute the fact of payment, especially as to the last credit, which is the only material one to the defense made to the note. Hence, the plaintiff has no right to complain of this instruction under any view of the law. No complaint is made of the other instructions which are exceptionally good.

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III. It is next insisted that there is not a single fact in the evidence which would warrant the verdict. This court in the exercise of its appellate jurisdiction has the right to interfere when it appears from the direct evidence, and the attending circumstances, that the finding of the jury is against all reasonable probabilities. In the case of *Price, Adm'r, v. Ins. Co.*, 48 Mo. App. 281, the rule was stated in this way: "We must recognize the fact that this is an action at law wherein the trial court performs the functions of a jury, and, if in the exercise of that function it has made *admissible inferences* from the evidence produced, we are bound by the finding. *With the credit to be given to that evidence, as opposed to the testimony of plaintiff's witnesses, we have nothing to do.*" So in the present case, if the verdict of the jury is supported by reasonable and fair inferences which are authorized by the evidence, this assignment must likewise be ruled against the plaintiff. In support of the plaintiff's side of the case the evidence tended to prove that the payment represented by the credit of December 14, 1882, was made by Donley in the city of Hannibal; that the wife of the payee received the money, and that she indorsed the credit on the note on the day the money was paid. These facts were testified to by her. There was some evidence that the credit of May 26, 1883, was in the handwriting of Donley. The only evidence concerning the last credit, as we have heretofore stated, was that the indorsement was in the handwriting of the payee. Opposed to this there was evidence tending to prove that Donley failed in business in the city of Hannibal, in 1878; that he was well known there; that he left Hannibal as early as 1880; had not been seen there since, and that his place of residence was unknown. It also appeared that Chamberlain was the only solvent party on the note; that Craig made inquiries for Donley, but could not

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find him; and that Craig and Chamberlain both lived in the city of Hannibal until the death of Craig on the tenth of May, 1891.

It may be conceded for the purposes of the argument that the plaintiff's evidence was sufficient to establish the payments antedating that of December 14, 1882, and that there was no substantial opposing evidence. The question then is whether the adverse finding of the jury as to the three last payments can be upheld. We think it can. The jury was authorized by the evidence to find that Donley was not in Hannibal on December 14, 1882, and, therefore, could not have made the payment of that date in the manner testified to. The jurors were also authorized to find that the credit of May 26, 1883, was not in Donley's handwriting, because there was evidence tending to show that he left Hannibal prior to that time; that he had not been there since; that his place of residence thereafter was unknown; and that Craig lived in Hannibal during the entire time, and there was no evidence that the note had been sent away for collection. The last indorsement was in Craig's handwriting, or at least there was evidence tending to prove this. The facts that the note was fifteen or sixteen years old when this indorsement was made, that Donley, the principal, had been gone for six or seven years, and that Chamberlain was perfectly solvent, are sufficient to sustain the finding as to this alleged payment. It must be borne in mind that the jurors are the sole judges of the credibility of the witnesses, and the weight to be given to the evidence. While the verdict is opposed to the direct evidence, and is against the weight of the evidence, for the reasons stated we do not think that we could be justified in reversing the judgment.

IV. There is complaint made that the plaintiff's motion for a new trial was inadvertently overruled, and

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that the order was made without any consideration of the motion on its merits. This is an unusual assignment of error, if it can be said that such a matter can be the subject of review. The record only shows that the motion was inadvertently overruled during the absence of the plaintiff's counsel. The presumption is that such action would not have been taken by the court under any circumstances, had not the judge been of the opinion that the motion ought to be overruled.

Finding no error in the record, the judgment will be affirmed. All the judges concur.

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ALEXANDER CARTER, Appellant, v. CATHERINE W. PHILLIPS *et al.*, Respondents.

St. Louis Court of Appeals, April 19, 1892.

Taxes: RECOVERY BY PURCHASER AT VOID JUDICIAL SALE. One who purchases land at an invalid sale of the same for general taxes, and who subsequently pays taxes thereon, cannot, in the absence of a statutory provision therefor—and there has been none in this state since 1877—recover from the owner of the land, either the amount paid by him for the land at such sale, or the amount of the taxes subsequently paid by him.

Appeal from the Carter Circuit Court.—HON. JOHN G. WEAR, Judge.

AFFIRMED.

J. C. Carty and *Wm. Carter*, for appellant.

(1) The court erred in sustaining the defendant's demurrer to the plaintiff's petition. The petition stated a cause of action against the defendant, which entitled him to a recovery. R. S. 1889, sec. 7570; *White v.*

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Shell, 84 Mo. 569; *Bingham v. Birmingham*, 103 Mo. 345; *Pitkin v. Reibel*, 104 Mo. 505; *Kemp v. Cossaart*, 14 S. W. Rep. 465; Black on Tax Titles, sec. 267; Cooley on Taxation, p. 374. (2) The court erred in holding, as it must have done, that the doctrine of "*caveat emptor*" applied to the sales of lands under a judgment for taxes, for the state had a lien for the unpaid taxes, and the purchaser at such back-tax sales became subrogated to the rights of the state under her lien. Authorities above cited, and *Valle's Heirs v. Fleming's Heirs*, 29 Mo. App. 152; 8 Mo. App. 145; *Schaefer v. Causey*, 9 Mo. App. 199; *Ry. & Trans. Co. v. Skinner*, 9 Mo. App. 189. (3) The court erred in holding, as it must have held, that plaintiff was not entitled to recover the taxes which he had paid upon said lands after his purchase of the same, and prior to the recovery of the same in the action of ejectment by respondent. See authorities above cited.

No brief filed for respondent.

Biggs, J.—On October 11, 1887, the plaintiff became the purchaser of certain lands in Carter county, which were on that day sold by the sheriff under an execution issued upon a judgment for the taxes assessed against the land for the year 1885. The legal title to the land, as it appeared from the records, was vested in Frederick Phillips, who was named as a party defendant in the tax suit, and publication was had against him. The defendants are the heirs-at-law of Frederick Phillips, and, at the October term, 1890, of the circuit court of Carter county, they recovered from the plaintiff the possession of the land by judgment of ouster in an ejectment suit. The plaintiff's tax title failed for the reason that Frederick Phillips was dead at the time the tax suit was instituted. Subsequent to the sale under the tax judgment, and prior to the

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institution of the suit in ejectment, and before the plaintiff was informed of the infirmity of his title, he paid the taxes assessed against the lands for the years 1888 and 1889.

The present action was instituted by the plaintiff for the purpose of recovering the amount bid by him at the tax sale, and also the taxes subsequently paid by him. The petition set forth the above facts. The circuit court sustained a demurrer to the petition, and, the plaintiff refusing to plead further, final judgment was entered on the demurrer. The plaintiff has brought the case to this court by appeal.

We are of the opinion that the demurrer was rightly sustained. The rule of *caveat emptor* applies to the purchase of land at a tax sale. The purchaser must beware of what he purchases. He either gets the land or nothing. Where, as in this case, he gets nothing by his purchase, the circumstances may be such as to create an equity in his favor for reimbursement to the extent to which his money discharged the taxes rightly assessed against the land, but it is only a bare equity and not enforceable in the absence of a statute on the subject. A like equity exists in favor of every purchaser at execution sale who fails to get title. Mr. Black in his work on tax titles says: "A mere purchase of land at a tax sale gives no lien enforceable in equity for the reimbursement of the money paid. But, when the tax title proves defective, the statutes of several states create a lien in favor of the purchaser for the amount of the price paid, either generally or in special cases." Black on Tax Titles, sec. 266. Judge Cooley thus states the rule: "The tax purchaser buys, therefore, under the operation of the rule *caveat emptor*, and under common-law rules would get nothing unless he got the land itself; but undoubtedly he has an

equity, in the event of his title failing, to be reimbursed for his expenditure, and this the legislature in a number of the states has deemed it proper to make provision for." Cooley on Taxation [2 Ed.] 476. In this state the revenue law of 1872 (2 Wag. Stat., sec. 219, p. 1206) provides in substance that, if the holder of a tax deed was defeated in an action of ejectment, he might under certain circumstances recover from the owner of the land the full amount of all taxes paid at the time of the purchase, and also all subsequent taxes paid by him. The decisions of the supreme court in *White v. Shell*, 84 Mo. 569, and *Pitkin v. Reibel*, 104 Mo. 505, upon which the plaintiff relies, rest on this statute. These cases in no way aid the plaintiff, for the reason that this section of the revenue law was repealed in 1877 (Laws of 1877), and has never been re-enacted. So in the case of *Bingham v. Birmingham*, 103 Mo. 345, upon which the plaintiff also relies. That was a suit to recover taxes paid at a void tax sale, and the right of recovery was based on a similar provision in the charter of Kansas City in reference to void sales for city taxes. The judgment for the taxes paid was sustained solely on the authority of the charter provision. Like actions have been maintained in Iowa (*Everett v. Beebe*, 37 Iowa, 452; *Sexton v. Henderson*, 45 Iowa, 160; *Claussen v. Reyburn*, 14 Iowa, 136; *Orr v. Travacier*, 21 Iowa, 68; *Thompson v. Savage*, 47 Iowa, 524); also in Kansas (*Belz v. Bird*, 31 Kan. 139; *Coonradt v. Myers*, 31 Kan. 30; *Arn v. Hoppin*, 25 Kan. 707), and in Indiana (*Creeelius v. Mann*, 84 Ind. 147); but the judgments in all of these cases were sustained under statutes authorizing the recovery of all taxes paid by the holder of a void tax deed.

As to the payment of the taxes for the year 1888 and 1889 the plaintiff was a mere volunteer. The taxes were paid by the plaintiff without request, either

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express or implied, and the petition fails to allege a subsequent promise by the defendants to reimburse him. Judge WAGNER in the opinion of the court in the case of *Allen v. Richmond College*, 41 Mo. 302, 309, stated the rule in this way: "As a general proposition, no man can make himself the creditor of another by any act of his own unsolicited and purely officious. There must be a previous authorization, either express or implied, or an assent or sanction given after the money is paid or the act done. If a plaintiff volunteers a payment on account of a defendant without any authority or request, express or implied, the defendant is not obliged to reimburse him."

There are exceptions to this rule, but the present case cannot be brought within any of the exceptions. It cannot be taken out of the rule upon the idea that the taxes were paid under a mistake of ownership. "The rule," says Judge COOLEY, "as to the remedy in cases in which parties have paid taxes under a supposition that they were the owners, which afterwards proved to be erroneous, are different in different states. In some states such a payment would not only give the party paying a right of action against the owner of the land, but would also give him a lien upon the land for his security. But there is no general rule to this effect, and in the absence of any statute on the subject the ruling of the federal supreme court would be followed, that ignorance of the law in respect to title and good faith in the payment of taxes will not sustain an action where the payment has been voluntary, without any request from the true owners of the land, and with a full knowledge of all the facts." Cooley on Taxation, pp. 467–8. The decision of the court in the case of *Napton v. Seaton*, 71 Mo. 358, 369, is in harmony with the law as stated by Judge COOLEY. That was a suit in ejectment, and it appeared that the defendant had in good

faith paid the taxes on the land in dispute, believing that he was the true owner. His contention was that the plaintiffs must account to him for the taxes. The court disposed of the matter in this way: "As to defendant's right to recover taxes paid, it may be said that such payments were not made upon the request of the plaintiffs, but were entirely voluntary; that the assertion of title on the part of Mrs. Miller, upon the truth of which plaintiff relied, had the effect of depriving her of the use and enjoyment of the lands, and of allowing the use of the same to remain in the defendant. No action can be maintained for money paid for another, except upon previous request, express or implied, or subsequent assent and sanction."

The payment by one tenant in common of all taxes rightly assessed against the common property, where his cotenant fails to contribute his share, forms an exception to the rule. The paying tenant cannot be treated as a mere volunteer in the payment of the tax by reason of his actual interest in the property itself. The case of *Union Ry. & Trans. Co. v. Skinner*, 9 Mo. App. 189, 199, presented such a state of facts, and the affirmance of the decree of the circuit court could well have been arrested on this principle.

So a mortgagee may pay the taxes on the mortgaged premises, when the mortgagor has defaulted in their payment. He has the right to preserve his security. But even in such a case the supreme court has decided (*Horrigan v. Wellmuth*, 77 Mo. 542) that his claim for such taxes must be enforced as a part of the mortgage debt, and not otherwise, In other words, if the mortgage is satisfied without the adjustment of the claim, the mortgagee would not be permitted to maintain an independent action for debt against the mortgagor, or an action in equity for the enforcement of the tax lien by virtue of the law of subrogation.

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Under these authorities we must conclude and hold that the plaintiff has no cause of action, and consequently the judgment of the circuit court must be affirmed. The reasoning of the supreme court in *Valle v. Fleming*, 29 Mo. 152, and of this court in *Schaefer v. Causey*, 8 Mo. App. 142, would seem to lead to a different conclusion, but the common-law rule governing the present action must be followed by us, as it seems to have the direct support of the decisions of the supreme court to which we have alluded in this opinion.

With the concurrence of the other judges, the judgment of the circuit court will be affirmed. It will be so ordered.

THE STATE OF MISSOURI, Respondent, v. W. H. PHILLIPS *et al.*, Appellants.

St. Louis Court of Appeals, April 19, 1892.

Criminal Law: OPEN AND GROSS LEWDNESS: SUFFICIENCY OF THE EVIDENCE. The evidence in this cause is considered, and *held* insufficient to support a conviction for the crime charged, which was open and gross lewdness.

Appeal from the Barry Circuit Court.—HON. JOSEPH CRAVENS, Judge.

REVERSED (*and defendants discharged*).

No brief filed by either appellants or respondent.

THOMPSON, J.—This was an indictment for open and notorious lewdness under section 3798 of the Revised Statutes. The entire section is as follows: "Every person who shall live in a state of open and notorious adultery, and every man and woman, one or both of whom are married, and not to each other, who shall lewdly and lasciviously abide and cohabit with

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each other, and every person, married or unmarried, who shall be guilty of open, gross lewdness, or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor." The charging part of the indictment is in the following language: "Were then and there guilty of open, gross lewdness, grossly scandalous, to-wit, were then and there guilty of openly having sexual intercourse with each other, the said W. H. Phillips then and there being a married man, and the said Celia Ann Phillips being then and there an unmarried woman." The defendants were convicted and sentenced to pay a fine of $10 each, and they appeal to this court. No assignment of error nor any statement or brief has been filed by the defendants or by the state. Nevertheless, it becomes our duty to examine the record under the mandate of the following statute: "No assignment of error, or joinder in error, shall be necessary upon any appeal or writ of error in a criminal case, issued or taken pursuant to the foregoing provisions of this article; but the court shall proceed upon the return thereof without delay, and render judgment upon the record before them." R. S., sec. 4297.

Proceeding to examine the record under this statute we find that the evidence discloses the following state of facts: The female defendant was the divorced wife of H. D. Phillips, and the male defendant was the brother of H. D. Phillips. The male defendant was a married man, who lived on a farm with his wife and five or six children. The female defendant lived in a log house with her three children about a half a mile from the house of the male defendant. He and his wife were frequent visitors at the house of the female defendant. H. D. Phillips had been in the habit of watching the house of the female defendant (his

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divorced wife), and he testifies that he had even lain near the house all night, and had seen his brother, the male defendant, come out of the house in the morning. The only evidence of the act on which the indictment is predicated was evidence to the effect that in the daytime H. D. Phillips, having had occasion to go near the house of the female defendant to look for his cattle, and suspecting that his brother, the male defendant, was in the house, climbed up on the outside of the house, which was a log house, to the height of two or three logs from the ground, and looked through an aperture or hole in the chinking, and saw defendants on the bed together in the act of adultery. The house was a log house and had no windows. It was lined inside with clap-boards, and the door was closed. This was not an act of open lewdness within the terms of the statute, and within the language of the indictment, but it was an act of secret adultery.

Another attempt was made on the part of the state to support the indictment by evidence tending to show that, while the two defendants were riding together in a wagon on a public highway, the wife of the male defendant and others being in the wagon with them, the male defendant put his arm around the shoulder of the female defendant and kissed her. This evidence was contradicted by the evidence of the wife of the defendant and by the defendants themselves; but, although the jury may have believed it, it did not tend to show an act of open, gross lewdness or lascivious behavior, or of open and notorious public indecency, grossly scandalous, within the meaning of the statute.

A large mass of other testimony was put in, which was incompetent and irrelevant to the issues. The state put in evidence, in chief, the bad character of the defendants for morality in the neighborhood in which they lived, and the counsel for defendants did not see

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fit to object to it and to save an exception. We do not refer to this error for the purpose of intimating that, in the absence of an exception properly taken and saved, we could make it a ground of disturbing the judgment, but rather for the purpose of emphasizing our conclusion on the whole record, that the parties seem to have been tried and convicted upon neighborhood rumor and neighborhood prejudice, rather than upon any evidence of any act done in violation of any clause of the statute under which the indictment was drawn.

It is ordered that the judgment be reversed, and the defendants discharged. All the judges concur.

JAMES A. NEAL, Appellant, v. A. L. SMITH *et al.*, Respondents.

St. Louis Court of Appeals, April 19, 1892.

1. **Mechanics' Liens:** INSUFFICIENT ACCOUNT. An account filed as a mechanic's lien, though filed by the original contractor with the owner of the land, and though for the amount of the agreed contract price, will be insufficient to create a lien, if it consists of a single lumping charge for the erection of the building as per contract.

2. ———: SUFFICIENCY OF ACCOUNT. *Held*, in the course of discussion, that the goodness of the mechanic's lien cannot depend upon whether the action for the enforcement of the lien is brought upon an express contract or a *quantum meruit*.

Appeal from the Greene Circuit Court.—HON. O. H. TRAVERS, Special Judge.

AFFIRMED.

A. W. Barry, for appellant.

It is the conceded doctrine in this state that the statutes relating to mechanics' liens are remedial, and

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should be liberally construed. *De Witt v. Smith*, 63 Mo. 263; *McAdow v. Sturtevant*, 41 Mo. 220. The building having been constructed entire under a contract, all the terms of which have been complied with, the contract price is *prima facie* evidence of the value of the work done and the materials furnished. *Rude v. Mitchell*, 97 Mo. 365. Where a special contract has been fully executed and nothing remains but to pay the stipulated sum of money due thereon, a plaintiff may sue on the contract, and the contract will determine the rights of the parties. *Mansur v. Botts*, 80 Mo. 655; *McDermott v. Jones*, 2 Wall. 1. Where the entire work has been performed and materials furnished strictly in pursuance of a contract between plaintiff and defendants as owner, there having been no changes nor additions made, an account of claim setting forth said contract and the amount due thereon is sufficiently specific. *Hilliker v. Francisco*, 65 Mo. 598; *Kern v. Pfaff*, 44 Mo. App. 34. Where the contract for construction of the building is for a sum in gross, as in this case, the one item given is sufficient. *Lewis v. Cutter*, 6 Mo. App. 56; *Kling v. Railroad*, 7 Mo. App. 411. The contract recited in the lien becomes a part of it, and constitutes a "just and true account." *Nelson v. Withrow*, 14 Mo. App. 278.

Haseltine Bros., for respondents.

THOMPSON, J.—This action is brought by a principal contractor to recover $900, the contract price for the building of a house under a contract made between the plaintiff and the defendant, A. L. Smith, who was the owner of the ground upon which the house was built, joining as defendant H. Donohue, a subsequent purchaser from Smith, and E. A. Hamilton, who is trustee in a deed of trust placed upon the property. At the trial the mechanic's lien paper was offered in

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evidence by the plaintiff, but was rejected by the court, and thereafter judgment was given against the validity of the lien, but also in favor of the plaintiff against the defendant Smith for the sum for which the action was brought, with interest and costs. To reverse this judgment and secure the establishment of the mechanic's lien, plaintiff prosecutes this appeal.

The plaintiff gave evidence tending to show that he made a contract with the defendant, A. L. Smith, then the owner of certain described premises, to erect a frame house of certain dimensions upon the premises for the round sum of $900, and that the contract was not reduced to writing. He then offered in evidence a mechanic's lien paper, in which the account was stated as follows:

A. L. Smith, To James A. Neal, Dr., May 14, 1890. To building house above described, as per above contract........................ $900

The circuit court committed no error in rejecting the mechanic's lien paper based upon this single item of account. The case falls entirely within the decision of the supreme court in *Rude v. Mitchell*, 97 Mo. 365, where it was held that, where the account, filed as the basis of a mechanic's lien in a case between the original contractor and the owner, states the whole contract price of the building in one item, this is not the "just and true account" required by the statute, but is worthless as a basis of a lien, and that, where the builder files such an account, he acquires no lien. In that case, outside of items for extras and alterations, the account was as follows:

1882, December 1. For alterations and additions, to buildings numbers 210 and 212 N. Third street, as per plan and specifications.... .... $22,287 00

In *Smith v. Haley*, 41 Mo. App. 611, 620, 621, we followed and applied the decision in the last-named case, where the first item of the account was simply

this: "To building complete, one two-story house with mock-mansard roof, situated at number 2819 Sheridan avenue, for contract price, $3,990."

It is impossible to distinguish these two cases from the case now under consideration. We add a thought, called up by the printed argument submitted for the appellant, which is that the goodness of the mechanics' lien cannot on any conception be made to depend upon the question, whether the action against the owner is brought upon a contract itself or upon a *quantum meruit.*

The judgment of the circuit court will accordingly be affirmed. It is so ordered. All the judges concur.

CHRISTIANA TRABUE *et al.*, Respondents, v. THE DWELLING-HOUSE INSURANCE COMPANY, Appellant.

St. Louis Court of Appeals, April 19, 1892.

1. **Fire Insurance Policy:** CONDITION AS TO CHANGE IN TITLE: SALE OF PROPERTY IN PARTITION. A policy of fire insurance contained the following provision: "This entire policy * * * shall be void * * * if any change, other than the death of the insured, takes place in the interest, title or possession of the subject of the insurance, * * * whether by legal process, or judgment or by voluntary act of the insured, or otherwise." The insured died, and devised one-third of his estate to his wife during her widowhood, and remainder to his children. Subsequently the property insured, a dwelling, was set apart to the widow, during widowhood, under partition proceedings between the devisees. *Held*, that a change of title had been effected, under these proceedings, which avoided the policy.

2. ———: INSURANCE OF DIFFERENT SUBJECTS BY SAME POLICY: BREACH OF CONDITION AS TO ONE. The policy in question insured said dwelling and the furniture therein in separate amounts. *Held* (*following Holloway v. Dwelling-House Ins. Co.*, 48 Mo. App. 1), that it was avoided as to both by said breach of condition as to the dwelling, since it expressly provided that the entire policy should be void in case of such breach.

Appeal from the Ralls Circuit Court.—HON. THOS. H. BACON, Judge.

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REVERSED AND CERTIFED TO SUPREME COURT.

Hicklin & Yeates, for appellant.

Reuben F. Roy, for respondents.

THOMPSON, J.—This was an action upon a policy of fire insurance, insuring a dwelling-house in the sum of $1,000, and insuring furniture therein in the sum of $250. The plaintiffs had a verdict and judgment, and defendant prosecutes this appeal.

There is no dispute as to the facts upon which the case must turn. The policy contained the following clause: "This *entire policy*, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void * * * if any change, other than the death of an insured takes place in the interest, title or possession of the subject of insurance (except change of occupants without vacancy or other increase of hazard), whether by legal process, or judgment, or by voluntary act of the insured, or otherwise."

The policy was issued on the twenty-fifth of April, 1888. Long prior to the date of this policy, to-wit, on the twenty-seventh of February, 1864, the assured therein and Christiana Manly entered into an antenuptial contract, by which, in consideration of their intended marriage to each other, each one of them agreed to forego all legal rights whatsoever in the estate of the other, and to take nothing of the estate of the other unless the same should be given in writing or by will. Prior to the date of the policy, namely, on December 12, 1881, the assured, being at that time married to the said Christiana, executed his will, in which he referred to this marriage settlement, and devised and bequeathed to his wife one-third of his real and personal estate during her life, *or until she should marry again*, remainder to his four children in fee. Again, prior to the

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date of the policy, on December 16, 1885, he added a codicil to the will, the import of which is not material to this case. Again, subsequent to the issuing of this policy, he added a second codicil to his will, in which he reduced the interest of his son, Taylor Jones, in his estate under his will to a life-estate with remainder to the heirs of his body. Soon after making this last codicil, the assured died. Thereafter his widow, Christiana Trabue, proved the will, and took out letters testamentary thereunder. Thereafter, on the tenth of August, 1889, the widow and the heirs joined in a proceeding for the partition of the real estate left by the deceased, Anthony E. Trabue. The petition recited the marriage settlement already referred to, the will, the appointment of the widow as executrix thereunder, described the real estate left by the testator and the provisions of the will, and prayed for partition according to the terms of the will. Such proceedings were had that a partition was made according to the terms of the will, setting apart to the widow, during the period of her widowhood, one hundred and ninety acres of land, which included the dwelling-house in which the deceased had died, which was the subject of this policy of insurance, and which was the residence of the deceased and his family at the time of his death. The property, thus set apart as the widow's share, was valued by the commissioners at $10,238. The evidence does not show what the value of the dwelling-house was. Thereafter, on October 16, 1890, the dwelling-house and furniture were totally destroyed by fire, no notice having previously been given to the company of the change of title and interest thus produced, and no agreement thereto having been made by the company by indorsement or otherwise.

Upon this state of facts we take the law to be that there was such a change of interest and title in the

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dwelling-house as avoided the entire policy under its language as above quoted. In order to reach this conclusion, it is not necessary to hold that the fact of having entered into this marriage settlement, and of having made his will, which became operative upon his death, worked a change in the interest or title of the property insured, "other than the death of the insured," within the language of the policy. We rest our conclusion on that view, that the subsequent partition proceeding undoubtedly had this effect. This conclusion seems to be so obvious as not to require any examination of judicial precedents to confirm it. Nor have we found a case where, in a similar clause, the policy contained the reservation, in case of death, which this policy contains. Nevertheless, there are several analogous decisions. In *Dreher v. Ins. Co.*, 18 Mo. 128, there was a clause in the policy that "any transfer or change of title in the property insured" should avoid the policy. The policy was written upon the goods of two partners, and it was held that a dissolution of the partnership before loss, and a division of the goods so that each partner owned his portion in severalty, avoided the policy under this clause. In *Card v. Ins. Co.*, 4 Mo. App. 424, it was held, under a similar clause, in a policy written upon the goods of a partnership, that a transfer by one of the partners of his interest to a stranger operated to avoid the policy. In *Barnes v. Ins. Co.*, 51 Me. 110; s. c., 81 Am. Dec. 562, the policy contained the clause that it should be void, "when the title of any property insured shall be changed by sale, mortgage, or otherwise." It was held that a subsequent judicial partition of the premises operated to avoid the policy under this clause. DAVIS, J., in giving the opinion of the court, pointed out that a partition of the premises was equivalent to a sale and a purchase. In *Finley v. Ins. Co.*, 30 Pa. St. 311;

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s. c., 84 Am. Dec. 705, it was held that a condition in a policy, that it should be void, if the insured property should be alienated by sale or otherwise, was violated by a dissolution of partnership, and a sale by one partner of his interest to his copartner, the subject of the insurance being partnership property.

If the clause in the policy in the present case had not contained the reservation, "other than by the death of the insured," the mere fact of the death of the insured would have wrought such a change of title and interest as would have avoided the policy. *Hine v. Woolworth*, 93 N. Y. 75. And this would be so where, as in the present case, the assured had made a will which became operative upon his death. *Sherwood v. Ins. Co.*, 73 N. Y. 447.

Against this conclusion it is argued that the marriage settlement is void under the law of Missouri, and that the law of Indiana was not proved as a fact, and cannot be noted judicially. We do not comprehend the materiality of this argument, in view of the fact that, in the partition proceedings, the widow affirmed the marriage settlement, which she had the undoubted power to do. It is also argued that the widow took the property by descent, notwithstanding the marriage settlement and the will, as a homestead, under the provision of section 5439, Revised Statutes. Whether she might have taken a life-estate in the dwelling, as her homestead, under that section, needs hardly to be considered, because she did not do it. Nor does it appear that she could have done it, because the homestead which she might have taken is, by the terms of the statute, it being rural and not urbane property, limited in value to the sum of $1,500, and it nowhere appears what the value of the house was,—it may have been worth several times that amount. Nor is the argument, that the estate which she did take under the

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decree for partition was the same estate which she would have taken in the case of an apportionment of a homestead to her; because, under the homestead law, she would have taken a life-estate, whereas, under the decree, she took merely an estate for widowhood.

It thus appears very clearly that this partition proceeding wrought such a change in the title and interest in the property insured "by legal process or judgment," as avoided the policy under its terms. But it is argued that, under decisions in this state, this did not have the effect of avoiding the policy, in so far as it related to the personal property. We went over this question in the recent case of *Holloway v. Ins. Co.*, 48 Mo. App. 1, deciding it adversely to the contention of the plaintiff. It is not necessary to do more than to add that, whether or not there may be any room for doubt under the terms of the policy in *Crook v. Ins. Co.*, 38 Mo. App. 582, when construed in connection with the judicial decisions in this state, there can be no possible room for doubt under the terms of this policy, because the intention of the parties to the contract is expressed as pointedly as words could make it. The language is: "This *entire policy* * * * shall be void." With this clause in the policy, we cannot hold it good as to the furniture, unless we are prepared to assume the jurisdiction of making contracts of insurance for parties which they have not seen fit to make for themselves. The judgment is, therefore, reversed, with the concurrence of all the judges.

Our decision in this case being contrary to the decision of the Kansas City Court of Appeals, in *Crook v. Ins. Co.*, 38 Mo. App. 582, it is ordered that the cause be certified and transferred to the supreme court for final determination, under the mandate of section 6 of the amendment to the constitution, adopted in 1884.

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J. F. Lamb, Respondent, v. J. D. Bush, Appellant.

St. Louis Court of Appeals, April 19, 1892.

1. **Justices' Courts:** AMENDMENT OF STATEMENT OF CAUSE OF ACTION. This cause was instituted before a justice of the peace upon an account in favor of the plaintiff and against the defendant, which consisted of the following item: "For work and labor, $129.32." *Held*, that the statement was not a complete nullity, but that it could be amended.

2. ———: DENIAL OF COUNTERCLAIM. In an action before a justice of the peace the plaintiff does not admit a counterclaim, filed by the defendant, by not pleading thereto. In such actions affirmative matter set up by either party is understood to be denied, though no formal denial is filed.

3. **Instructions:** DRAWING CONCLUSIONS OF FACT. An instruction, which directs the jury to draw a disputable conclusion of fact, is properly refused.

4. **Practice, Appellate:** EXCEPTIONS TO INSTRUCTIONS. The action of the trial court in giving instructions cannot be reviewed on appeal, when no exception thereto has been saved in the trial court.

5. ———: SPECIFICATION OF MATTER COMPLAINED OF AS ERROR. It is the duty of an appellant to make such a statement of the facts, as will make apparent the relevancy of his assignments of error. In this cause the appellant assigned as error the refusal of an instruction, which directed the jury to disregard all evidence not of a certain character, but failed to point out any evidence to which the instruction could apply, and the assignment was, therefore, disregarded by this court.

6. ———: ———. *Held*, also that an assignment of error in the admission of evidence will be disregarded, when the appellant fails to point out the evidence objected to.

Appeal from the Greene Circuit Court.—Hon. W. D. Hubbard, Judge.

Affirmed.

Robt. G. Campbell, for appellant.

No brief filed for respondent.

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THOMPSON, J.—This action was commenced before a justice of the peace on the following statement:

SPRINGFIELD, MO., March 16, 1888.

J. D. Bush, Dr. to J. F. Lamb.

For work and labor $129 23

H. BROS.,
Attorneys.

In the circuit court the defendant moved to dismiss the action for want of a sufficient statement, whereupon the plaintiff asked and obtained leave to file the following statement:

"Now comes plaintiff and says that the defendant is indebted and owes plaintiff for work and labor done by plaintiff for the defendant from the twenty-sixth day of August, 1887, to the third day of March, 1888, as salesman (expenses to be paid by defendant); that the wages were $30 per month, which amounted to $187.50; that defendant paid $46; that there is a balance yet due, and owing to the plaintiff of $129.50; that the same is still due and owing plaintiff, with interest from demand, March 3, 1888, for which plaintiff asks judgment and costs. HASELTINE BROS.

"Attorneys for Plaintiff."

The defendant excepted to this ruling of the circuit court, and the propriety of this ruling is the first assignment of error on this appeal. We are of opinion that this ruling was not erroneous. It is undoubtedly the law that, where a statement filed before a justice of the peace is so entirely barren as to state nothing at all, —to amount to a mere nullity,—it is not amendable in the circuit court. *Brashears v. Strock*, 46 Mo. 221; *Dahlgren v. Yocum*, 44 Mo. App. 277. But we are of opinion that the statement of cause of action filed before the justice in this case was not so entirely barren as to cut off the right of amendment in the circuit court under this rule. Undoubtedly, it was a bad statement,

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and would not of itself have supported any judgment for the plaintiff within the ruling of this court in *Rosenburg v. Boyd*, 14 Mo. App. 429. In that case the statement was held bad, and the substantial parts of it were: "The defendant is justly indebted to them (plaintiffs) in the sum of $162.56 for money had and received heretofore on the —— day of ——, 1882." This was a statement to the effect, that the plaintiffs demanded judgment of the defendant in the sum of $162.50 for money had and received some time during the year 1882. But while we held that that statement was insufficient to support a judgment for the plaintiffs, we did not hold that it was insufficient in such a sense as not to be amendable in the circuit court. In *Brashears v. Strock*, *supra*, the statement which was held so bad as not to be amendable was as follows: "M. F. Strock (and the other defendants, naming them), to Richard Brashears, $50. To fifty dollars." That was no more than a statement that the plaintiff demanded of the defendants the sum of $50; but why, how, wherefore, on what account, was not stated. The court held that that was no statement, and that it was so barren of any element of a statement as not to be amendable. In *Swartz v. Nicholson*, 65 Mo. 508, the statement was: "C. S. Nicholson, debtor, to Marion Swartz, $14." This was just as barren as the statement in the preceding case, and on the authority of that case the supreme court held it not amendable.

Neither of these cases is authority for the proposition, that the present statement is so barren as not to be amendable. It is: "J. D. Bush, Dr., to J. F. Lamb, for work and labor, $129.32." The meaning of this is that the plaintiff claims of the defendant the sum of $129.32, for work and labor performed by the plaintiff for the defendant. That is the natural interpretation of it; and, hence, it does state, though meagerly and

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indefinitely, the cause of action for which the plaintiff sues. In *Penninger v. Reilley*, 44 Mo. App. 255, the substantial part of the statement was: "That the defendants, James Reilley & Co., on the thirteenth day of July, 1887, were indebted to the plaintiff in the sum of $131.35, for money then and there had and received by said defendants for the use and benefit of the plaintiff, which said sum is still due and wholly unpaid, for which plaintiff asks judgment." An analysis of this statement will show that, while it contains a little more verbiage, it is not more definite than the statement in the case before us; and yet we held that statement sufficient without amendment. That decision is a precedent for the conclusion, that the statement before us was at least amendable. If we were to hold that such a statement is not amendable, it would be tantamount to holding that no statement is amendable, except those statements which are definite enough to be good without amendment—which would be absurd and would defeat the policy of the statute.

The defendant filed in the circuit court an amended counterclaim, setting up a great many items of charges against the plaintiff, and striking a balance claimed to be due to the defendant from the plaintiff. There was no traverse to this counterclaim, and it is now urged that for this reason it should have been taken as confessed. We do not think this a sound view. This was an action commenced before a justice of the peace, and in such actions the rules of pleading applicable to actions commenced in courts of record do not apply. In such actions it is not usual for either party to file a defensive pleading, but affirmative matter set up by either party is understood as being denied without the formality of filing a denial.

Error is assigned on the giving of instructions on behalf of the plaintiff; but, as no exceptions were noted

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to the giving of those instructions, they must be laid out of view.

Complaint is next made of the refusal of the following instruction requested by the defendant: "The court instructs the jury that, if you find from the evidence that J. D. Bush, defendant, employed J. F. Lamb, plaintiff, on May 22, 1887, on a commission, and that they had no final settlement; and that, on August 26, 1887, they changed their contract, and defendant employed plaintiff for three months at $30 per month; and that, at the end of the said three months, plaintiff continued to keep the property of defendant out, he is not thereby entitled to wages. And if you find that J. D. Bush ordered J. F. Lamb, plaintiff, to report to him, and to turn in team at one Spangler's in December, then plaintiff cannot recover for any labor thereafter; but you will find for the defendant for all the time after the date you shall find that he ordered the team to be wintered at Spangler's." The defendant had given evidence tending to support the hypothesis of fact embodied in this instruction; but, nevertheless, we think that the court committed no error in refusing to give this instruction, for the reason that to give it would have beén to charge the jury upon questions of fact,—in other words for the court to draw conclusions of fact. Although the plaintiff may have employed the defendant on August 26, 1887, for only three months at $30 per month, yet it would not necessarily follow as a conclusion of fact that the mere fact of the plaintiff continuing to keep the property of the defendant after the expiration of that time would prevent him from recovering wages; the circumstances might be such as to imply a renewal or extension of the contract of hiring. Nor would the fact, that the plaintiff ordered the defendant to report to him, and to turn in the team at Spangler's in December, necessarily disentitle the plain-

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tiff to recover wages for any subsequent time, unless the command was disobeyed, and the disobedience was tantamount to a discharge of the plaintiff from the services of the defendant. The defendant got the benefit of the correct applicatory principle of law in the following instruction, which the court gave at the defendant's request: "The court instructs the jury that the plaintiff cannot (*sic*) recover wages only for the three months from August 26, 1887, and to the time thereafter he was ordered to quit work by defendant, if you find he was ordered to quit; and he is chargeable with all mills which went into his hands, and for which you may find from the evidence he has not accounted properly, as well as all wheat and oats; and you will consider the proof as to them in making up your verdict." We, therefore, see no prejudicial error in refusing the former instruction.

Error is also assigned on the refusal of the circuit court to give the following instruction requested by the defendant: "The court instructs the jury that this is an action for labor, and all evidence of any charges by the plaintiff against defendant, except for labor as a clerk or salesman at $30 per month is not to be considered by you in making up your verdict." The defendant has failed to make the relevancy of this instruction appear. He has failed to state that the plaintiff gave any evidence of any charges against the defendant outside of his wages at $30 per month for the period of six months and one week, amounting to $187.50. We have not only been sent to the record to get this instruction, but we are expected to go to the record to find out whether any evidence was given by the plaintiff such as ought to have been excluded by such an instruction, having regard to the statement of case in plaintiff's amended statement. It is the duty of an appellant to make such a statement of facts, as will make the rele-

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vancy of his assignments of error appear; and, as no such statement is made in this case, we overrule this assignment of error.

The defendant also argues that the judgment should be reversed for the error of admitting illegal testimony, but he nowhere points out what that testimony was.

We discover no prejudicial error in the record, and the judgment is, therefore, affirmed. All the judges concur.

LOUISA BECKMAN, Respondent, v. THE PHŒNIX INSURANCE COMPANY, Appellant.* 49 343
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St. Louis Court of Appeals, January 5, 1892.

Practice, Appellate: AFFIRMANCE OF JUDGMENT FOR FAILURE TO FILE TRANSCRIPT. If an appeal is granted by the trial court after the lapse of the term at which final judgment was rendered, so that the order granting it was invalid, the judgment cannot be affirmed in this court for the failure of the appellant to duly file a transcript therein.

Appeal from the Franklin Circuit Court.

MOTION TO AFFIRM DENIED.

E. T. & C. B. Allen, for appellant.

J. C. Kiskaddon and *C. F. Gallenkamp*, for respondent.

ROMBAUER, P. J.—The plaintiff moves to affirm the judgment of the trial court because the defendant has not perfected its appeal in the manner and within the time prescribed by law. It appears from the clerk's certificate that judgment was rendered in favor of the plaintiff on January 25, 1890, and that an appeal was granted to the defendant September 17, 1890. No transcript has been filed in this court.

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*The above opinion was not published in its proper place in Vol. 47 through inadvertence.

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The defendant resists the motion and files affidavits by which it appears that after judgment, and in due time it filed a motion for new trial which the court overruled; that twelve days thereafter and at the same term it filed an amended motion for new trial which the court overruled at a subsequent term, and that the reason that no transcript has been filed is that neither the appellant nor his attorney was ever notified by the circuit clerk of the completion of the transcript, which fact under the act of 1891 (Session Acts, 1891, p. 69) is made good cause for denying an affirmance of the judgment by an appellate court.

It appears that the clerk did not make out the transcript because he could not find some of the papers which were to be embodied in it. *Prima facie* it was the duty of the appellant's attorneys to furnish the papers necessary for the completion of his transcript to the clerk, and the clerk's statement shows want of diligence on part of the appellant's counsel. The statute is not designed to prevent an affirmance where the delay is due to the negligence of the appellant or of the appellant's counsel, and hence it is at least doubtful whether the affidavits show good cause under the statutes against the affirmance. On the other hand it would seem from the affidavits that the appeal has been improvidently granted after the lapse of the term when final judgment was entered, and hence that there is no appeal pending in this court, and that we have no jurisdiction to affirm the judgment.

Without committing ourselves as to the sufficiency of the affidavits as showing good cause under the statutes of 1891, we must overrule the motion to affirm as it appears *prima facie* that no appeal has been validly granted, and none is pending in this court.

The motion to affirm is denied. All the judges concur.

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HENRY E. CLEATON, Appellant, v. JOHN S. EMERY *et al.*, Respondents.

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Kansas City Court of Appeals, April 25, 1892.

1. **Corporations:** CHARTERED IN ONE STATE TO DO BUSINESS IN ANOTHER: COMITY. A charter to conduct an exposition at St. Joseph, Missouri, was obtained from the state of Colorado, with a capital of $1,000,000, when in fact there was only $43,000 stock subscribed. The laws of Missouri require that before such charter shall issue all the stock shall be *bona fide* subscribed, and one-half thereof fully paid up. The whole business of said corporation was to be conducted at St. Joseph, Missouri, where its principal office was, though there was provision for the establishment of branch offices at Denver, Colorado, and other places. *Held*, the rule of comity does not protect such corporation which was a fraud upon the laws of both states, and only colorable and absolutely void, and the incorporators were partners, and liable as such for the debts of the alleged corporation.

2. **Estoppel:** VALIDITY OF CORPORATION: CREDITORS. While one having secured some advantage from an alleged corporation cannot, on an attempt to enforce payment, deny the existence of the corporation, yet the corporate creditor seeking to enforce payment of his debt may ignore the existence of the corporation and proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with.

Appeal from the Buchanan Circuit Court.—HON. HENRY M. RAMEY, Judge.

REVERSED AND REMANDED.

Johnson & Wilson, for appellant.

(1) The attempt to incorporate in Colorado was a fraud on the laws of the state of Missouri and on the laws of the state of Colorado. *Hill v. Beach*, 12 N. J. Eq. 31; *Land Grant Co. v. Coffey Co.*, 6 Kan. 245; *Stout v. Zulick*, 7 Atl. Rep. (N. J.) 362; *Bank v. Earle*, 13 Pet. 520; *Mills v. Grocery Co.*, 15 S. W. Rep. (Tex.)

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505; 2 Morawetz on Private Corporations [2 Ed.] 924; Beach on Private Corporations, 296, 297; 2 Morawetz on Private Corporations [2 Ed.] 917. (2) Defendants having contracted the debt sued on, while assuming to act as the directors and agents of a corporation which had no legal existence as a corporation, are liable to plaintiff as partners. *Hill v. Beach*, 12 N. J. Eq. 31; *Land Grant Co. v. Coffey Co.*, 6 Kan. 245; *Empire Mills v. Grocery Co.*, 15 S. W. Rep. 505; *Richardson v. Pitts*, 71 Mo. 129; *Hurt v. Salisbury*, 55 Mo. 310; *Glenn v. Bergman*, 20 Mo. App. 343; *Martin v. Fewell*, 79 Mo. 401; *Mining Co. v. Richards*, 95 Mo. 106. (3) No rule of comity will allow one state to charter corporations to operate in another state. To hold that a state must recognize as legal a corporation thus spawned upon it is to say that the right of one state, aided by comity, is superior to the sovereign will of the other. When it is shown that the character of such a corporation is opposed to the settled legislative policy of the state wherein it is sought to be domiciled, it will not be held legal by reason of a rule of comity, and it is not necessary that a state should by express enactment exclude foreign corporations in order to indicate that they shall not be allowed to act within its jurisdiction. *Bank v. Earle*, 13 Pet. 592; *Empire Mills v. Grocery Co.*, 15 S. W. Rep. 506; *Christian Union v. Yount*, 101 U. S. 356; 2 Morawetz on Private Corporations [2 Ed.] ch. 13, pars. 959, 960, 965, 965*a*, pp. 917, 918, 919, 923, 924; 1 Beach on Private Corporations, ch. 9, par. 164, p. 297.

M. A. Reed and *Stephen S. Brown*, for respondents.

(1) Under the laws of Colorado, non-residents are permitted to incorporate. Doing what the laws of Colorado authorize cannot, therefore, be in law a fraud upon the laws of Colorado. *Humphrey v. Mooney*, 5

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Col. 282; 1 Morawetz on Corporations, sec. 35; *Railroad v. Railroad,* 31 N. J. Eq. 475. (2) The right of a corporation to do a thing outside of the state granting the charter depends upon the law of country. That all of its business was to be done by the very terms of its charter, outside of the charter state, is no defiance to contracts thus made, nor is the corporation a nullity in consequence thereof. *Merrick v. Van Santvoord,* 34 N. Y. 208; 10 Amer. Corp. Cases, 437–438; *Saltmarsh v. Spaulding,* 17 N. E. Rep. 317; *Food Co. v. Baumback,* 32 Fed. Rep. 208; *Land Co. v. Lilton,* 19 Fed. Rep. 73; *Calwell v. Springs Co.,* 100 U. S. 55; *Christian Union v. Yount,* 101 U. S. 356; *Stevens v. Pratt,* 101 Ill. 224; *Bank v. Lovell,* 2 Cin. 405; *Petroleum Co. v. Weare,* 27 Ohio St. 352; *Hanna v. International, etc., Co.,* 23 Ohio St. 622; 2 Morawetz on Corporations, secs. 991, 965*a*. The view sustained by the above cases "is now established by the great weight of authority." Cook on Stock & Stockholders, sec. 239.

Kelley & Kelley, also for respondents.

(1) It is said that a corporation must dwell in the place of its creation, that it must live and have its legal being under the law in that state, yet it does not follow that its existence there will not be recognized in other places. It may exercise the powers with which it is endowed by its charter in another state, when not prohibited from doing so by the laws of such other state. *Bank v. Earle,* 13 Pet. (U. S.) 519–597; 10 Myer's Federal Decisions, book C. 8, secs. 1077, 1123. The law does not require the incorporators to be citizens of the state in which the corporation is created. The legal corporate entity is in contemplation of law located and has its situs in the state creating it, but the promoters or stockholders—members of the corporation—may live

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in any or all states of the Union, and no one of them need live in the state granting the charter or certificate of incorporation, unless the statute requires it. *Humphreys v. Mooney*, 5 Col. 282; *McGinty v. Reservoir Co.*, 29 N. E. Rep. (Mass.) 510; *Maine v. Baumbach*, 32 Fed. Rep. 205. The corporators need not be subscribers to the capital stock or have any interest in the company. *Oil Co. v. Densmore*, 64 Pa. St. 43. This then was a corporation *de jure*. (2) If a corporate association has actually been formed in violation of law, it is not to be treated as no corporation at all, but rather as a corporation *de facto*, until its existence be terminated by the courts in a direct proceeding for that purpose. 2 Morawetz on Corporations, secs. 745, 746; *Gent v. Ins. Co.*, 107 Ill. 652; 6 Am. & Eng. Corp. Cases, 588; 4 American & English Encyclopedia of Law, p. 197, sub. 8, n. In such cases its members are liable to creditors to the amount of their stock, the same as if the corporation was legally created (2 Morawetz, sec. 755); but not as partners. Sec. 748; Cook on Stock & Stockholders, sec. 239. Although the organization be obtained by fraud, or for an unauthorized purpose, it is a *de facto* corporation at least, and the state only can interfere. 2 Morawetz, sec. 769; *Kayser v. Bremen*, 16 Mo. 90; *Macon Co. v. Shores*, 97 U. S. 227; *Atherton v. Sugar Creek*, 67 Ind. 334. The question of the existence of a corporation can only be raised by the state, in *quo warranto* or the like. It cannot be raised collaterally, and when a defective organization appears it will be sustained as a corporation *de facto*. *Ass'n v. Ins. Co.*, 3 Am. & Eng. Corp. Cases, 78, 90, n; *Eaton v. Walker*, 27 Am. & Eng. Corp. Cases, 310, n; *Bank v. Stearns*, 15 Wend. 314; *Church v. Pickett*, 19 N. Y. 487; *Heaston v. Railroad*, 16 Ind. 275; *Swartout v. Railroad*, 24 Mich. 393; *Bank v. Stone*, 38 Mich. 779; *Douglas Co. v. Bolles*, 94 U. S. 104; *Thompson v. Candor*, 60 Ill.

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247; *Barrett v. Mead*, 10 Allen (Mass.) 337; *St. Louis v. Shields*, 62 Mo. 247; *Freeland v. Ins. Co.*, 94 Pa. St. 504. (3) When a corporation is actually in existence, its proper organization will be presumed, and persons dealing with it cannot dispute the corporate existence, on the ground of informality in its creation. *Chub v. Upton*, 95 U. S. 666; 3 Am. & Eng. Corp. Cases, 90, n; 4 Am. & Eng. Corp. Cases, 175; 2 Morawetz, secs. 750–1; *Imboden v. Etowah*, 70 Ga. 86. And the corporation is estopped to set up irregularities in its own organization, when it has undertaken to act in its corporate capacity. *Whitney v. Wyman*, 101 U. S. 392; 3 Am. & Eng. Corp. Cases, 90.

Gill, J.—In the year 1889, the defendants, who compose some of the principal business men of St. Joseph, Missouri, conceived the idea of holding at said city a mammoth fair and exposition. To this end books were opened, but they were only able to secure subscriptions to the enterprise aggregating $43,000. In order, doubtless, to impress the country with the magnitude of the proposed undertaking, it was determined to organize a corporation with a stated capital of $1,000,000. But under the corporation laws of Missouri this could not be done with such a meager subscription of only $43,000, since by the provisions of our laws for the incorporation of such business enterprises, the whole of the stock must have been in good faith subscribed, and fifty per cent. thereof paid up before such million-dollar corporation could be organized. R. S. 1889, sec. 2768. To avoid this obstacle, and evade the restrictions of the laws of their own state, the defendants (all citizens of St. Joseph, Missouri) then sought to organize as a corporation under the laws of the state of Colorado, where it seems the capital stock may be named at any sum, however large,

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and the incorporators will be held to no individual liability beyond the amount by them subscribed. Carrying out this plan, these gentlemen entered into articles of association at St. Joseph, pretending the organization of "The National Railway, Electric & Industrial Exposition Association," with a stated capital of $1,000,000, whereas there was, in fact, at no time a subscription of stock exceeding the $43,000. These articles were, May, 1889, filed with the secretary of the state of Colorado, and a certificate of incorporation procured. By said articles of incorporation, the object stated was to hold said exposition at St. Joseph, Missouri, and the term of existence of the association limited to one year.

The enterprise proved a serious disaster, at least, financially; the assets of the pretended corporation proved inadequate for the payment of its debts, and this is an action by one of its creditors, whereby it is sought to hold the defendant incorporators liable as partners. The good faith of the corporation is attacked, on the ground that this organizing under the laws of Colorado was a legal fraud on the laws of that state as well as of Missouri; that there was then no incorporation, but that these defendants should be held liable as partners for its unpaid debts. No question is made as to the correctness of plaintiff's account; the only matter in dispute is whether or not the defendants are individually liable therefor.

The cause was tried by the court below without the aid of a jury; a finding and judgment was had in favor of defendants, and plaintiff has appealed.

I. It is of course well understood that the incorporating in one nation or state, either by special act or general law, has no extra-territorial force. In other words, the statute laws of one state have no force or effect as such in other states. Such recognition as is given corporate entities in states other than the parent

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state, or home, of the corporation comes alone from that international courtesy or law of comity always existing by common consent between different countries. It is then only by virtue of this inter-state "common law of comity" that the existence of this exposition corporation created in Colorado can be at all recognized in this state. It is not meant by this law of comity that because a certain corporation may have been, in form, created in one state it shall necessarily be permitted recognition in another state. "This law of comity was not established for the purpose of giving any state an unlimited power to dispose of the franchise of acting in a corporate capacity in other states. To obtain a charter for the purpose of evading the laws of a foreign state, under cover of the rule of comity, would be a fraud upon the state granting the charter; and to attempt to act under such charter in the foreign state would be a fraud upon the latter." This statement of the law is quoted from 2 Morawetz on Private Corporations, section 965*a*, and we regard it as a succinct and pointed recognition of the true rule; and under it we must hold the incorporation here in question only colorable and absolutely void. The procuring of the incorporation of this St. Joseph Fair Association was a fraud on the state of Colorado, as by its statutes it never was meant to incorporate a concern whose entire business was to be conducted in a foreign jurisdiction, not even providing for the location of its general or principal office within the limits of said state. Section 2, chapter 19, General Statutes, Colorado (1883), which must give life to this corporation (if it has any vitality), admits the right to incorporate for the purpose of conducting a business, a portion of which shall be within and a portion without the state, but impliedly rejects the creation of corporations whose principal office and whose entire business shall be maintained and operated in other states. It is

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there named as a requisite in the certificate of incorporation, that "it shall state the name of the town or place and the county in which the principal office of the company shall be kept" (where the entire business is to be transacted in that state); and, when any company shall be created under the laws of this state for the purpose of carrying on *part* of its business beyond the limits thereof, such certificate shall state that fact, and shall state the name of the town and county in *this state* in which the principal office of said company shall be kept."

Clearly then the statutes of Colorado meant to provide for the creation of such corporations, a *part*, at least, of whose business was to be transacted in that state, and manifestly, too, it was the intention that the principal office of the corporation should be kept in the state of Colorado; yet we have here in the articles of association signed by these defendants a provision that the principal office of the corporation shall be at St. Joseph, Missouri. It is true that the articles formerly stipulated for the establishment of branch offices at various cities throughout the country, and among them at Denver, Colorado. Still this does not cover up nor conceal the sole design of the incorporation which was the conduct of a fair and exposition at St. Joseph, and nowhere else. It is disclosed, too, that no branch offices were indeed ever established, unless it was from the appointment of an agent, so called, at Denver during the last days of the exposition at St. Joseph, and when the enterprise was already a pronounced failure.

We have here then the state of Colorado granting a corporate franchise to our own citizens to do business alone in this state. Not only that, but the sole purpose was to avoid the restrictions so wisely engrafted onto our corporation laws. To hedge about and protect its

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people from false appearances and merely advertised capital that has no real existence, our legislature has provided against the creation of those corporations of abundant pretenses, and no capital. Hence, it was not in the power of these defendants to incorporate, under the laws of Missouri, with a pretended capital of $1,000,000, while there was in fact less than $50,000 stock subscribed. And will it be permitted them to go to another state and do indirectly what they cannot do here directly? The state of Colorado attempted here by this incorporation to create and send out to another state this organized entity, not to do business within its own realm, but to carry on such business altogether in another state, The well-considered decision of *Land Grant Co. v. Commissioners of Coffey, Co.* (6 Kan. 245) is here applicable. There the corporation was created in Pennsylvania with authority to transact its business in any other state except Pennsylvania. The supreme court of Kansas denied such a corporation any recognition, using the following language: "No rule of comity will allow one state to spawn corporations and send them forth into other states to be nurtured and do business there, when said first-mentioned state will not allow them to do business within its own boundaries." * * * "A corporation, in order to have any legal existence, must have a home, a domicile, a principal place of business within the boundaries of the state which creates it."

So, in the state of Texas, where corporations for mercantile purposes were not permitted, but a firm at Dallas, in that state, secured incorporation in Iowa, the courts of Texas declined to recognize the concern as a corporation, and held the pretended incorporators as partners. *Empire Mills v. Grocery Co.*, 15 S. W. Rep. 505.

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And in the state of New Jersey certain persons, with the design of operating a quarry in that state, went to New York, and became incorporated with a view of limiting their liability. The New Jersey courts refused to recognize such pretended incorporation, declaring that "it was perfectly manifest, upon the face of such proceedings, that the attempted organization under the general laws of New York respecting corporations was a fraud upon the law of that state," and the defendants were held "as partners trading under the name they have assumed." *Hill v. Beach*, 12 N. J. Ch. Rep. 31. Without occupying further space we refer to the text-books and cases cited by plaintiff's counsel.

We have carefully read and considered the cases relied upon by defendants; and, while some have gone far in the direction of admitting the validity of foreign corporations, regardless of where the business thereof shall be prosecuted, we have yet to find a decision that goes to the extent we are asked to go in the case at bar. In all of these we find some semblance, at least, of business done or performed in the home state of the corporation, such as the yearly elections of directors and officers at the office of the company, kept in the legal domicile of the corporation, as were the cases of *Merrick v. Van Santvoord*, 34 N. Y. 208, and *Hanna v. Company*, 23 Ohio St. 622. Or cases where the corporation was organized in one state and extended its operations into other states, as in *Atchison, T. & S. F. Ry. Co. v. Fletcher*, 35 Kan. 236. Or, as in the case of *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. Rep. 205, where, though the main business of the corporation was transacted in jurisdictions other than the parent state, and the incorporators lived in such other states, yet its general office was maintained, and the

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corporate elections carried on at such home office in the parent state.

So, too, the case cited in the text-books and in defendant's brief, decided by the superior court of Cincinnati, entitled *Second Nat. Bank v. Lovell*, 2 Cin. Rep. 397, has gone almost to the verge of absurdity in sustaining the charters of foreign corporations. But there the incorporation was saved, because the articles of association provided a home office at Covington, Kentucky, and under its charter the corporation was entitled to do business in Kentucky, the parent state, and it did keep its principal office there, where, too, its elections were held.

We conclude, then, this to be an effort to have the state of Colorado create a Missouri corporation. To concede its validity and recognize its existence, is to admit authority in another state to direct the granting of such franchises in the borders of this commonwealth; in short to yield to Colorado the partial exercise of our state's sovereignty. If this is to be allowed, then any business house at St. Joseph, Kansas City, or elsewhere in this state, desiring to incorporate and thereby limit the liability of the owners and promoters, may get up their articles of association and may choose to go to Denver and secure incorporation, rather than to Jefferson City, even though the entire business of the proposed corporation (including the maintenance of its principal office, the election of directors, etc.) shall be done at St. Joseph or Kansas City; and this is to be permitted because, forsooth, the laws of Colorado are more "*liberal*" than those of Missouri. Such an evasion of our laws by our own people, it seems, can receive no countenance from the courts, even under the laws of comity.

II. It is however claimed that plaintiff cannot in this collateral action question the legality of the

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corporate existence with which he nominally dealt; that plaintiff contracted with this assumed corporation as such, and that now he will not be permitted to deny its legal existence. If said corporation was now seeking to enforce some obligation made to it by the plaintiff, then the contention would be of some avail. It would be said to him that having secured some advantage, having acquired money or property from the alleged corporation, he could not, on an attempt to enforce payment on his promise to pay therefor, deny the existence of the corporation. There would be, in such case, good grounds of estoppel. "But this rule, in this state at least, has been confined to cases where the corporation, or those claiming under the corporation, assert some rights under the contract. * * * But the propriety of applying the rule to a case where a party makes a contract with a body, believing it to be a corporation, when in fact such body is no corporation, thereby leaving him remediless to enforce his contract against anyone, has been expressly denied." *Glenn v. Bergman*, 22 Mo. App. 346; *Martin v. Fewell*, 79 Mo. 401; *Hurt v. Salisbury*, 55 Mo. 310; *Granby Mining Co. v. Richards*, 95 Mo. 110.

The books quite uniformly agree, that "a corporate creditor seeking to enforce the payment of his debt may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners by proving that the prescribed method of becoming incorporated was not complied with by the company in question. He is not estopped from so doing, since he is not repudiating a contract, but is enforcing it. The fact that he contracted with them under a corporate name is immaterial, since at common law parties may carry on business under any name they choose." Cook on Stock & Stockholders, 233, and cases cited. Applying these rules to the case

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at bar, these defendants were assuming to prosecute a business under the name of a corporation, but said incorporation, as already said, was procured by a legal fraud, and had no rightful or real existence; and hence, under all the authorities, the defendants are liable as partners. Beach on Corporations, sec. 162, and authorities *supra*.

The judgment of the circuit court will, therefore, be reversed and the cause remanded to be proceeded with in accordance with the principles here announced. All concur.

THE JEWELL PURE WATER COMPANY, Respondent, v. HARKNESS & RUSSELL, Garnishees, Appellants.

Kansas City Court of Appeals, April 25, 1892.

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1. **Garnishment**: MORTGAGOR AND MORTGAGEE. A mortgagor agreed with the mortgagee that the latter should retain the surplus proceeds of the mortgagee sale and apply the same in payment of certain subsequent advances made by the mortgagee to the mortgagor. After the sale, which produced a surplus, the mortgagee was garnished by an attaching creditor of the mortgagor. *Held*, the agreement, though not in writing nor acknowledged and recorded, was valid, and the garnishment should fail, as the agreement was a pledge consummated by possession.

2. ———: DEFENDANT'S RIGHT. An attaching creditor can hold the garnishee only to the extent of the defendant's claim against the garnishee.

3. ———: MORTGAGEE'S LIABILITY. Any removal of the mortgagee's liability to the mortgagor, which is the result of a *bona fide* contract made before a garnishment, cannot be interfered with or changed by the garnishment.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

REVERSED AND REMANDED.

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L. A. Laughlin, for appellants.

Process of garnishment cannot be made to operate so as to annul the contracts of parties. The plaintiff stands only in the shoes of the defendant, and the plaintiff's rights against the garnishee are no greater than those of the debtor, and the garnishee cannot be placed in a worse position than he would have occupied had he been directly sued by the debtor in the attachment suit. The plaintiff cannot recover against the garnishee unless the defendant could recover in a similar action. *McPherson v. Railroad*, 66 Mo. 103; *Fenton v. Block*, 10 Mo. App. 536; *Reinhart v. Soap Co.*, 33 Mo. App. 24; *Firebaugh v. Stone*, 36 Mo. 114; *Weil v. Tyler*, 38 Mo. 545; *Funkhouser v. Eveland*, 3 Mo. App. 602; *Bank v. Staley*, 9 Mo. App. 146. The garnishees were not restricted in the payment of rent, labor and other claims to the expenses allowed by the mortgage.

Lathrop, Morrow & Fox, for respondent.

After a sale under the mortgage the surplus is subject to garnishment process. 8 American & English Encyclopedia of Law, p. 1155; Jones on Chattel Mortgages [3 Ed.] sec. 817; *Casebolt v. Donaldson*, 67 Mo. 808; *Bank v. Brainard*, 20 Fed. Rep. 917; Drake on Attachment [6 Ed.] sec. 539, and cases cited; *Guano Co. v. Sparks*, 18 Fed. Rep. 281; *Barker v. Osborne*, 71 Me. 69; *Worder v. Baker*, 67 Wis. 408.

Ellison, J.—The defendant, the Kansas City Towel & Laundry Company, was doing a laundry business in Kansas City, Missouri, and as an addition to their plant purchased of the plaintiff on credit a filter, giving therefor its notes; subsequently and on October 26, 1888, the laundry company executed a chattel mortgage on its plant, including the filter received from the plaintiff, to R. S. Crohn, to secure notes amounting to

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$4,100, and on the same day the notes and mortgage were transferred to Harkness & Russell, garnishees. Default being made in the payment of these notes the garnishees, on January 2, 1889, took possession of the property covered by the chattel mortgage, and on February 5, 1889, sold out the mortgaged property under their chattel mortgage. In the meantime the laundry company, not having paid plaintiff the purchase price of the filter, plaintiff brought suit against the laundry company by attachment, and on February 5, 1889, served on the garnishees their notice of garnishment within a few hours after the sale under the mortgage had taken place. The property sold for $5,100, thus leaving a surplus of about $1,000 in the hands of garnishees; and it was this surplus which the plaintiff sought to reach by its garnishment. The garnishees resisted the plaintiff's right to reach this surplus upon the theory that they had made a previous arrangement with Crohn, the manager of the laundry company, whereby garnishees advanced money to the laundry company to pay off old bills, etc., with the understanding that they were to repay themselves from the proceeds of the mortgage sale if the proceeds were sufficient for that purpose.

The agreement between the garnishees and Crohn, the manager of the defendant, whereby the surplus remaining in the hands of garnishees after payment of the mortgage debt was to be applied on these advances, was not in writing, nor was it acknowledged and recorded in accordance with the law respecting chattel mortgages. Plaintiff's contention is that this agreement, though it may have been valid as between the parties, was void as against plaintiff who was a creditor of the defendant. The evidence showed the surplus was appropriated to the unsecured debt before the garnishment.

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Our opinion is that the garnishees ought not to be held on the garnishment in this cause. By the terms of the oral agreement between the mortgagor and these garnishees (who are assignees of the mortgagee) the surplus which arose on the sale of the mortgaged property should become the garnishees for the payment of advances made by the garnishees to the mortgagor. This agreement, the sale under the mortgage, and the fact of a surplus, all took place *before* the service of garnishment. The agreement here was in the nature of a pledge which became consummated by possession before the garnishment. This answers plaintiff's objection that the agreement was void under the statute in relation to chattel mortgages, in that it was not in writing and recorded. For, where there is possession in the mortgagee or pledgee, there need not be a written instrument.

But, again, it is plain that the defendant mortgagor could not have maintained an action for this surplus against these garnishees, in the face of his agreement. This is sufficient to defeat the garnishment. For "an attaching creditor can hold the garnishee only to the extent of the defendant's claim against the garnishee, and he can acquire no rights against the latter, except such as the defendant had, and he is not permitted to place the garnishee in any worse condition than he would occupy if sued by the defendant." *McPherson v. Railroad*, 66 Mo. 103; *Reinhart v. Soap Co.*, 33 Mo. App. 24.

The question is presented from another standpoint. These garnishees as mortgagees (for, by the assignment of the mortgage to them, they became, practically, the original mortgagee) had an unsecured debt or claim against the mortgagor at the date of the sale of the mortgaged property, upon which the surplus herein arose. We need not decide whether the mortgagees

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would, from this fact alone, have a right to appropriate the surplus to the payment of their unsecured debt; but we do hold, that since the mortgagor authorized them so to do, before the service of the garnishment, they could properly make the application. If these garnishees had been sued by the mortgagor for the surplus here in dispute, they could undoubtedly have made a successful defense on the facts of the case. Plaintiff as a garnishing creditor cannot be permitted to change the nature of the contract between the garnishee and the defendant. And any removal of the mortgagee's liability to the mortgagor which is a result of a *bone fide* contract made before the garnishment cannot be interfered with or changed by the garnishment. *Chapin v. Jackson*, 45 Ind. 153; *O'Brien v. Collins*, 124 Mass. 98, 586; *Harris v. Ins. Co.*, 35 Conn. 310; *Railroad v. Wheeler*, 18 Md. 372; *Doyle v. Gray*, 110 Mass. 206; *Drake v. Harrison*, 69 Wis. 99.

The case of *Hyde v. Larkin*, 35 Mo. App. 365, relied upon by plaintiff, is not applicable to the facts in this case. The general manager here had authority to pay the debts of the corporation, and he did more than this when he authorized the mortgagee to apply the surplus to the payment of such debt.

The judgment is reversed and the cause remanded. All concur.

JOHN A. GWIN *et al.*, Respondents, v. JOHN M. SMUR, Appellant.

Kansas City Court of Appeals, April 25, 1892.

1. **Contracts:** MONEY PAID ON VOID CONTRACT, RECOVERED. The contract of the husband and wife to sell the real estate of the latter held by the general title is worthless and binds neither party thereto, and is no consideration for money paid thereon, nor . . the obligation of forfeiture therein, and said money so paid can be recovered, and no stipulation of such contract can defeat such recovery.

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2. ——: ——: SPECIFIC PERFORMANCE: RES ADJUDICATA. An action for money had and received against a husband to recover money paid on the void contract of himself and wife to sell her general realty will not be barred by a former action for specific performance of the same contract.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

AFFIRMED.

C. S. Crysler and *Jas. H. Harkless*, for appellant.

(1) Plaintiffs' contention that they were not bound by the terms of the contract, because Mrs. Smur was a married woman, is no excuse. It is for the party resting under the disabilities, if any, to take advantage of it, and not for the other party to raise it for us in order to escape the effect of its terms, and this is particularly true when the party bound does not show, or attempt to show, or even allege any offer of compliance, upon their part, with the contract. This contract was especially good as to John M. Smur. *Weeden v. Maxwell*, 63 Mo. 486; *Lobaugh v. Thompson*, 74 Mo. 600; *Alexander v. Lydick*, 80 Mo. 341; *Houx v. Sharp*, 18 Mo. App. 45. (2) The contract read in evidence contained a stipulation, the $500 paid thereunder, and ought to be recovered in this action, was to be forfeited for the non-performance of any or either of several distinct acts, which the plaintiffs had agreed therein to perform. And plaintiff's failure and refusal to perform either or any of the conditions of the contract fixed the said sum as damages due to defendant, and, in the absence of any reason alleged in their pleading or shown by their proof, is binding, and cannot be recovered in this form of action. *Staples v. Parker*, 41 Barb. (N. Y.) 652; *Hamilton v. Overton*, 38 Am. Dec. 138, and notes. (3) The former case of *Gwin v. Smur*

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finally decided in 101 Mo. 550, and referred to on page 17 of the abstract is a bar and conclusive, and finally and fully adjudicates all matters between the parties to this action, growing out of said contract. *Railroad v. Trauber*, 59 Mo. 355; *Mason v. Summers*, 24 Mo. App. 174.

Moulton & Callahan and *G. T. Purcell*, for respondents.

(1) The judgment was for the right party, and for this reason it should not be disturbed. *Nelson v. Foster*, 66 Mo. 381. (2) There is no merit in the plea of former adjudication. The subject-matter of the two suits was not the same. No judgment was recovered by these respondents, and different parties. Under such facts, it would not constitute a bar to this action. The case cited by appellants, from 59 Mo. 355, is decisive on this point against them. See page 362. (3) The substantial rights of appellants were in no way affected by the pleadings. In law and morals they should refund this money; and the judgment is for the right party. *Miller v. Railroad*, 105 Mo. 467; *Mississippi v. Ring*, 58 Mo. 491; *Heidecker v. Ganzhorn*, 50 Mo. 154; *Jackson v. Magruder*, 51 Mo. 55; *Fell v. Mining Co.*, 23 Mo. App. 216.

Gill, J.—In December, 1886, Gwin and Dougherty made what purported to be a contract with the defendant Smur and his wife for the purchase of certain real estate which was owned by Mrs. Smur as her general property. Gwin and Dougherty paid on the contract the sum of $500. Subsequently, Gwin and Dougherty brought suit against Smur and wife asking specific performance of the contract. But the circuit court decided the case for the defendant Smur, and dismissed the bill and principally on the ground that, as the real estate

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covered by the so-called contract was not the equitable separate estate of the wife, the contract was void and non-enforceable. This judgment was afterwards affirmed by the supreme court. *Gwin v. Smur*, 101 Mo. 550.

In the supreme court, the plaintiffs, Gwin and Dougherty, made the point, that at all events the court should award them a return of the $500 which they had paid Smur on said void contract, but such claim was held outside the bounds of that suit; but Judge SHERWOOD, speaking for the court, used this language: "Plaintiffs have, however, an undoubted right to recover this money in an action for money had and received, inasmuch as any supposed forfeiture of that sum under the so-called contract by failure to pay the second installment when due, fell with it, and because of the invalidity of the instrument in which it was contained." Thereafter the plaintiffs brought this action as for money had and received against defendant Smur to recover the $500 which they had paid to him on account of the adjudged void contract. Defendant sought to defeat the case by alleging and showing plaintiffs' default under the contract of sale, and that by the terms of said contract the $500 had been forfeited.

The cause was submitted to the court without a jury, and the following declared as the law of the case: "The title of the land described in the contract of sale set forth in defendant's answer having been in the wife of defendant when such contract was made, and her estate in said land being general and not her sole and separate estate, such contract of sale was void both as to her and her husband, and, therefore, constituted no consideration for the money paid by plaintiffs thereon, nor for the obligation of forfeiture of such $500 in the contract for default of plaintiffs, and, it further appear-

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ing that such contract of sale has not been carried out by the defendant and his wife, the plaintiffs herein are entitled to recover back from defendant the $500 paid on such contract and sued for herein."

From a judgment in plaintiffs' favor for the $500 and interest, defendant has appealed.

The mere statement of this case readily suggests its decision. Through the instrumentality of a worthless and void contract for the sale and conveyance of his wife's real estate, defendant Smur has obtained $500 from these plaintiffs which in equity and good conscience he ought to return. Smur holds that sum of money which he got possession of by means of a void, non-enforceable contract—therefore, without consideration; and as said by the supreme court "plaintiffs have an undoubted right to recover this money in an action for money had and received." 101 Mo. 553.

Said real-estate contract was not only void and worthless as to Mrs. Smur, but as well invalid as to this defendant, her husband. It was as a blank piece of paper, worthless for any purpose. *Gwin v. Smur, supra; Craig v. Van Bebber*, 100 Mo. 585; *Brown v. Miller*, 46 Mo. App. Since, then, the Smurs were not bound on said so-called contract, neither were the plaintiffs. The matter then set up in the answer constitutes no defense. The plaintiffs' right to this money, thus held by defendant Smur, cannot be defeated by reason of any supposed stipulation in said nugatory instrument.

Neither was the subject-matter of this suit involved in the prior litigation, and hence the plea of former adjudication is without merit.

The judgment here is clearly for the right party and will be affirmed. All concur.

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EDWIN CHURCHMAN, by Next Friend, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, April 25, 1892.

1. **Practice, Appellate:** EVIDENCE: GENERAL OBJECTION: MOTION FOR NEW TRIAL. A general objection to evidence cannot be made the basis of an exception; and the motion for a new trial must make sufficient reference to objectionable evidence to secure its review in the appellate court.

2. **Contributory Negligence:** DEFENSE. It is not incumbent upon the plaintiff in the first instance to show that he was free from negligence, or in the exercise of ordinary care, but the concurring negligence of the plaintiff is matter of defense, and the burden of showing it is on the defendant; and the instructions in this case are approved.

3. **Practice, Appellate:** IMPROPER REMARKS IN CLOSING ARGUMENT: MOTION FOR NEW TRIAL. Improper remarks of counsel making a case which the law will not allow, if objected to and unrebuked, constitute ground for reversal; but such remarks must be set forth *in hæc verba* in the bill of exceptions, and it is not sufficient in itself to prevent them in a motion for a new trial, nor to state their tendency.

4. ———: DAMAGES: EXCESSIVE: ABSTRACT. Where the abstract contains no evidence as to the extent of the damages the appellate court cannot review the excessiveness of the verdict, as it assumes everything in favor of the verdict and the action of the trial court.

Appeal from the Clay Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

F. F. Rozzelle and *W. S. Cowherd*, for appellant.

(1) To allow the introduction of ordinance number 40147 over the objection of defendant's counsel, was error. (2) It is well-settled law in this state that it is not incumbent upon defendant in cases of this kind to show that plaintiff was guilty of negligence, if plaintiff's own evidence shows that he was guilty of

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contributory negligence. *Nichols v. Winfrey*, 79 Mo. 544, 551; *Taylor v. Railroad*, 26 Mo. App. 336; *Brown v. Railroad*, 31 Mo. App. 661; *Milburn v. Railroad*, 86 Mo. 104. The instruction was, to say the least, misleading and calculated to confuse the minds of the jury, and for this reason, if for no other, it should not have been given. *Clark v. Kitchen*, 52 Mo. 316. (3) In the argument of the case, counsel for plaintiff stated that the testimony showed plaintiff was still suffering from his injuries when his deposition was taken, and no one could tell how long the suffering would continue. Defendant's counsel objected to this line of argument on the ground that the petition did not ask, nor the instructions warrant, any recovery for permanent injuries. The objection was, by the court, overruled, and an exception was saved. No duty incumbent upon the judge of a trial court is more imperative or more important to the fair and orderly administration of justice than that of interposing to restrain everything in the trial of a cause that tends to mislead the jury and to divert their minds from the strict line of inquiry with which they are charged. 1 Thompson on Trials, sec. 955; *Gibson v. Zeibig*, 24 Mo. App. 65, and cases cited in opinion on rehearing at page 70; *Ritter v. Bank*, 87 Mo. 574; *State v. Lee*, 66 Mo. 165. (4) The damages are excessive.

Robert Adams and *T. B. Buckner*, for respondent.

(1) The principle is too well settled in this jurisdiction to require any citation of authority, that a question of fact will not be reviewed unless all the evidence is set out bearing upon the question. Under such circumstances, the appellate court must assume facts in favor of the verdict. *Houseman v. Hope*, 20 Mo. App. 193; *Pembroke v. Railroad*, 32 Mo. App. 61. (2) The learned counsel, on this assignment of error, base

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their argument on a quotation taken from appellant's motion for a new trial, which does not represent what counsel did say. The appellant, if it had wanted to save an exception, should have set out the language in the exact words used by counsel, and not a mere conclusion. But since the record fully sustains the argument imputed to plaintiff's counsel, it is useless to pursue this point further. (3) This identical instruction was once before this court in this identical case, and, while counsel strongly criticised this instruction, the court nowhere in its opinion disapproved it. Respondent might rest this instruction upon the principle of *stare decisis*, but in this case it is unnecessary. The instruction is a proper one under any circumstances, and, specially so in this case, in view of instruction, numbered 1, given by the court, the giving of this instruction was rendered necessary. *Buesching v. Gas Co.*, 73 Mo. 229; *Swigart v. Railroad*, 75 Mo. 480; *Stephens v. Macon*, 83 Mo. 357; *Harrison v. Railroad*, 74 Mo. 369. (4) There can be no question that the ordinance was competent for the purpose for which it was offered. The writer thinks there is equally no question that it was competent on the question of showing an admission of negligence on the part of defendant. It was an admission made of record with all the formalities of a legislative enactment, and made before the injury occurred. In *Brennan v. City of St. Louis*, 92 Mo. 488, the point is decided by Judge Black, who holds that it is proper to show "knowledge thereof by the city at the time the injury occurred." It was admissible also to show it was a highway over which the city had control. Same authority and cases there cited. The case of *Alcorn v. Railroad*, 108 Mo. 81, cited by counsel, is also an authority which draws the distinction as above stated, and cites the *Brennan case, supra*, as an authority for it. *Rudhouse v. Conway*, 126 Mass.

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377; *Martin v. Towle*, 59 N. H. 32; *Railroad v. Benz*, 53 Ga. 126; *Railroad v. Gleason*, 69 Ga. 200; *Railroad v. Henderson*, 51 Pa. St. 815; *Railroad v. McElwee*, 67 Pa. St. 311; *McKee v. Bidwell*, 74 Pa. St. 218; *Emporia v. Schmidling*, 33 Kan. 485; *Dole v. Railroad*, 83 N. Y. 472.

Smith, P. J.—This case was here on a former occasion, and is reported in 44 Mo. App. 665, where there will be found a statement of all the facts which are necessary to a proper understanding of the questions arising on the present appeal. When the case was here before, the judgment, which was for plaintiff, was reversed and the cause remanded. It appears there has been a second trial wherein the plaintiff has been successful. The defendant again appeals.

I. The first ground of the defendant's appeal is that the trial court erred in permitting the plaintiff to introduce city ordinance number 40147. The defendant's objection to the introduction of this ordinance was that it was "incompetent, irrelevant and immaterial." These objections are too general. There was no specification, as there should have been, of the particular ground on which the ordinance was inadmissible under such general objections. So general an objection cannot be made the basis of an exception. In the light of *Clark v. Loan Co.*, 46 Mo. App. 248, and the cases there cited, it would be seen that there was no objection, which we can notice, interposed. And besides this the motion for a new trial does not make such a reference therein to the objectionable evidence as to require any notice of it by us. The defendant's first ground of appeal must, therefore, be ruled against it.

II. The defendant further complains of the action of the trial court in giving the second instruction for

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plaintiff which told the jury, although the plaintiff cannot recover, if, at the time of the injury, he was guilty of any negligence directly contributing to the injury, * * * yet the plaintiff is not required to show that he was free from any such negligence, * * * but the defendant must show that the plaintiff was guilty of negligence directly contributing to the injury. We do not think this complaint is well grounded. The rule of law is, we think, well settled in this state that, in cases of this kind, it is not incumbent upon the plaintiff in the first instance to show that he was free from negligence, or, in the exercise of ordinary care at the time of receiving the injury complained of, but the concurring negligence of plaintiff is a matter of defense, and the burden of showing it is, therefore, upon the defendant. *Fairgrieve v. Moberly*, 29 Mo. App. 142; *Buesching v. Gas Co.*, 73 Mo. 229; *Sturgis v. Railroad*, 75 Mo. 480; *Stephens v. City of Macon*, 83 Mo. 357; *Parsons v. Railroad*, 94 Mo. 286; *O'Connor v. Railroad*, 94 Mo. 150; *Donovan v. Railroad*, 89 Mo. 147; *Huckshold v. Railroad*, 90 Mo. 548. Contributory negligence is a defense that must be pleaded and proved.

The plaintiff's first instruction informed the jury in effect that before they could find for plaintiff they must further find that he was guilty of no negligence directly contributing to his injury. The two instructions taken together, we think, were unexceptionable, and furnished a proper guide for the jury when they retired to consider their verdict.

III. The defendant makes the further contention that the counsel for plaintiff in his closing argument before the jury exceeded the limits of legitimate argument. Whether this contention is well founded or not we are unable to determine, since the abstract nowhere sets forth the words employed by counsel to which objection is made. The rule is well settled, that where

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counsel have attempted to make a case in their argument which the law would not allow them to make in their tenders of evidence, such conduct if objected to, and allowed to go unrebuked, constitutes a valid ground for the reversal of the judgment. *McDonald & Co. v. Cash & Hainds*, 45 Mo. App. 66. But we are unable to tell whether the remarks of the plaintiff's counsel are obnoxious to this rule or not, unless the same were before us, which is not the case. The presentation of such remarks in the motion for a new trial is not of itself sufficient. The statement of their tendency or of the conclusion of the party objecting, as to their character, will not do, and especially so when the adverse party, as is the case here, controverts such statement. Such remarks should be set forth *in hœc verba*. Then we could determine whether they were proper or improper.

IV. The defendant's final contention is that the verdict is excessive, but as the abstract contains no evidence whatever as to the value of the property, or as to extent of the damages resulting from the injuries, there is nothing relating to the contention before us which we can review. We must assume in favor of the verdict and the action of the trial court, that there was evidence to support the verdict. *Pembroke v. Railroad*, 30 Mo. App. 62; *Houseman v. Hope*, 20 Mo. App. 193. It follows that the judgment must be affirmed. All concur.

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SAMUEL W. HARRINGTON, Plaintiff in Error, v. JOSEPH B. EVANS, Administrator, Defendant in Error.

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54 599 **Kansas City Court of Appeals, April 25, 1892.**

Administration: APPEAL BY HEIRS: JUDGMENT FOR COSTS: WRIT OF ERROR. Where heirs appeal from allowance against the estate in the probate court, if on a trial anew in the circuit court judgment is rendered against the estate, there can be no more adjudgment against the appellants for costs than there could be for the debt or damages mentioned in the appeal bond. The statute providing for such is complete in itself, and is not analogous to the statute allowing appeals from the justices' courts; but, like the statute permitting appeals in forcible entry and detainer, no judgment can be rendered against the appellants therein in a summary manner; and such judgment may be reached by writ of error.

Error to the Platte Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

REVERSED.

Cook & Gossett, for plaintiff in error.

(1) The appeal from the probate court was from a judgment against the administrator, and, although not taken by him, it was necessarily taken for him, and he was in court on the appeal. Who could the judgment for the claim be rendered against but him? And how could judgment be rendered against him if the appeal by the other parties interested did not bring him into court? Being in court, and the judgment being rendered against him for the claim, judgment necessarily followed against him for the costs. There is nothing on the face of the record to show that this judgment, rendered at the April term, 1890, was erroneous, and it was not erroneous in such respect

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that it could be set aside, under the statute, at a subsequent term. G. S., sec. 2920. (2) If the motion of the administrator, upon which the judgment against plaintiffs in error was rendered, should be held not a part of the record proper to be considered in these proceedings, yet the error appears in the judgment itself, it is a void judgment, for the court had no authority to render it. No presumption in favor of the court's action or proceedings in this cause can help this judgment. The appellate court will review the record proper, although no motion for new trial or in arrest was filed. *Bagby v. Emerson*, 79 Mo. 139; *McIntire v. McIntire*, 80 Mo. 470; *O'Connor v. Koch*, 56 Mo. 253; *Finkbeyer v. Mallen*, 62 Mo. 555.

Jas. W. Coburn, for defendant in error.

(1) The motion to relieve the administrator of the costs of the appeal in the circuit court, and the action of the court thereon, do not constitute a part of the record, and will not be considered by this court. (2) There was no motion for a new trial, and the attention of the trial court was in no way called to the alleged error. In such cases the appellate court will only correct errors materially affecting the merits of the case. *Gobin v. Hudgens*, 15 Mo. 400; Whittlesey's Missouri Practice, sec. 408, p. 517, and cases cited. (3) A writ of error will not lie from a judgment for costs. *Love v. Newton*, 26 Mo. App. 11, and cases cited; *Boggess v. Cox*, 48 Mo. 278; *Crockett v. Lewis*, 66 Mo. 671. (4) As the administrator did not appeal from the probate court, he was not liable for the costs of that appeal, and the judgment against him for the costs of that appeal was irregular and erroneous on the face of the papers, which show that he did not appeal, but that the plaintiffs in error did appeal. The court

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can at any term correct such errors patent on the face of the papers. *Rankin v. Lawton*, 17 Mo. App. 574; *Phillips v. Evans*, 64 Mo. 17; *Sheely v. Verkamp*, 30 Mo. App. 53, and cases cited; *Burgess v. Hitt*, 21 Mo. App. 315. (5) The party prevailing shall recover his costs, except where a different provision is made by law. R. S. 1889, sec. 2920; *Belkin v. Rhodes*, 76 Mo. 643, and cases cited on page 652. (6) The bond required in section 288, Revised Statutes, 1889, was not intended to be given by an administrator in cases like the present one. While the appellants, the heirs of Luhetta Harrington, were required to give bond, it was never intended that they should give bond for and pay the judgment rendered in the case for the debt, but merely for the costs of the appeal. The court will look upon the bond merely as a security for costs. Courts can always include the security for costs in the judgment for costs. R. S. 1889, sec. 2935; *McCartney's Adm'r v. Anderson*, 49 Mo. 456; *Davis v. Farmer*, 28 Mo. 54; *Hamilton v. Moody*, 21 Mo. 79.

SMITH, P. J.—A demand was allowed by the probate court of Platte county in favor of LaFayette Harrington against Joseph B. Evans, administrator of the estate of Luhetta Harrington, deceased, for the sum of $1,455.57. Afterwards, Samuel W. Harrington and other heirs of the deceased filed an affidavit and bond with themselves as principals and Gossert as security for an appeal to the circuit court, which was granted. On a trial *de novo* in the circuit court, judgment was rendered against said estate for $425 and costs. At a subsequent term of the court, on the motion of the administrator, the said judgment as to the costs of appeal was set aside, and the same were taxed and adjudged against the heirs, who had appealed, and Gossert, their security on their appeal bond.

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These facts sufficiently appear upon the face of the record proper. The said heirs and their said surety have sued out their writ of error, and have brought up for our review the record proper in the case.

I. The plaintiffs in error contend that the judgment rendered by the circuit court in the first instance in favor of LaFayette Harrington against the estate of the deceased for $425 and costs was proper, and that, therefore, the court erred in subsequently setting aside said judgment as to the costs of the appeal and adjudging the same against them. The question thus presented must be decided in the light of the statute. Section 285 provides that an heir, devisee, legatee, creditor, or other person having an interest in an estate under administration, may appeal from the decision of a probate court to the circuit court. It is further provided by section 288 that every such appellant shall file in the court the bond of himself in a sum, and with security approved by the court, "conditioned that he will prosecute the appeal and pay all debts, damages and costs that may be adjudged against him." It would seem that where the administrator for any cause does not prosecute an appeal from the decision of the probate court, then any one of the persons designated by the statute may do so for him and in his name. But it is to be observed that the statute nowhere contains any provision authorizing or requiring the party so appealing to be made a party. While the appeal is taken for the estate, there is no change in the name or style of the parties to the action. The appellants *pro hac vice* represent the administrator and the estate. Their relation to the case is similar to that of the landlord where the tenant has been sued for possession. He cannot become a party to the action, and yet he can defend the suit in the name of the tenant. *Walser v. Graham*, 45 Mo. App. 629. The bond of the party

thus intrusted by the statute with the right to represent the estate in the appellate court is intended as an indemnity to the estate against any injurious consequences resulting to it from the appeal. If, on a trial anew in the circuit court, judgment is rendered against the estate, there can be no more adjudgment against the appellants for costs than there could be for the debt or damages mentioned in the appeal bond.

The statute providing for appeals from the probate to the circuit court is complete in itself. No provisions there to be found authorizing judgment to be rendered in the circuit court against the appellants and their sureties on the appeal bond as in the statute—section 6349, Revised Statutes—in relation to appeals from justices of the peace. The bond required by statute to remove by *certiorari* or appeal an action of forcible entry and detainer into the circuit court is conditioned that the defendant "will pay all rents and profits, damages and costs that may be adjudged against him," and which is quite similar to that in cases like the present. R. S., secs. 5129, 5131, 5141. The statute in relation to forcible entry and detainer makes no provision for rendering judgment against the sureties on the bond as in cases under the practice act before justices of the peace. It has been several times decided that it does not authorize a judgment on the appeal bond against the principal and sureties in a summary manner as in ordinary appeals from justices. *Keary v. Baker*, 33 Mo. 603; *Gunn v. Sinclair*, 52 Mo. 327; *Powell v. Camp*, 60 Mo. 569. In the last-cited case the judgment which had been rendered in the circuit court against the principal and sureties on the bond was reversed, and judgment rendered against defendant alone without reference to the bond.

We do not think that a judgment could be rendered on the bond against the appellants and their sureties in

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a summary manner, for the reason that the rendition of like judgments is forbidden, as we have seen, on bonds authorized by similar statutes. There being no statute authorizing a judgment on the appeal bond, *in this case* it follows that the judgment as originally entered was proper. No other judgment could have been rendered.

It is not disputed that this is so, except as to costs. The statute provides that, in all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases where a different provision is made by law. R. S., sec. 2920. In this case the appellee having prevailed in the circuit court he was entitled to recover his costs against the estate, as there was no provision of law otherwise providing for the payment of same.

This is not a suit "*commenced* in the name of one person to the use of another," so that the costs cannot be adjudged as provided in section 2935, Revised Statutes. There is nothing taking the case out of the ordinary statutory rule as to the payment of costs.

The error complained of is not only apparent of record, but it is a material one which discloses a judgment in favor of a party not entitled to it upon record. The court had no jurisdiction to render a judgment in favor of the defendant, the administrator, against the heirs and their surety on their official bond. This error is palpable, and may be corrected on writ of error. *McIntyre v. McIntyre*, 80 Mo. 470; *Miller v. Davis*, 50 Mo. 572; *Pendergast v. Hodge*, 21 Mo. App. 138.

It follows that the judgment of the circuit court will be reversed, and the original judgment is hereby reinstated. *Burgess v. Hitt*, 21 Mo. App. 313.

All concur.

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LOUIS HERRING, Appellant, v. JOHN E. CORDER, Respondent.

Kansas City Court of Appeals, April 25, 1892.

1. **Replevin**: VAGUENESS OF JUDGMENT. A judgment in replevin "that defendant recover the said ninety-one hogs and three calves, or at his election take a judgment for $442, the value of the property so adjudged to be returned to him," is a substantial compliance with the statute, and when taken with the connection is not so vague as to invalidate it.

2. ———: OBJECTION TO VERDICT. Even if the value of each separate article of property ought to be found by the jury in a replevin case, an error in failing so to find is waived, if not objected to at the return of the verdict.

Appeal from the Saline Circuit Court.—HON. RICHARD FIELD, Judge.

AFFIRMED.

Samuel Boyd, for appellant.

The judgment is erroneous because: *First*. It is not in the alternative as required by statute. The language of the judgment is "that the defendant recover of plaintiff the said ninety-one hogs and three calves, or, at his election, take judgment for the sum of $442." The language of the statute in reference to judgments of this kind is that it shall be "that the plaintiff return the property or pay the value so assessed at the election of defendant." R. S. 1889, sec. 7490; *State ex rel. v. Dunn*, 64 Mo. 70; Cobbey on Replevin, sec. 1105, p. 631. *Second*. It does not sufficiently describe the property to be returned, the description being "ninety-one head of hogs and three calves, taken by writ of replevin."

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The description of the hogs and calves sued for contained in the petition, answer and order of delivery is "ninety-one head of hogs, consisting of barrows, sows, shoats and pigs," and "three suckling calves." The description in the judgment is not the same as in the pleadings, and no pleading is even referred to for description. The description is too indefinite. Cobbey on Replevin, sec. 1099, p. 628. *Third.* The value of the property is not properly assessed. The ninety-one hogs and three calves are assessed at an aggregate value of $442. The assessment should show the value of the property taken—that is, the value of the hogs, sows, barrows, shoats and pigs—and the value of the calves, specifically and separately. *Gulath v. Goldstein*, 7 Mo. App. 67; *Warehouse v. Johnson*, 85 Ala. 178; s. c., 4 S. Rep. 643; *Black v. Black*, 74 Cal. 520; 16 Pac. Rep. 311; *Lang v. Dougherty*, 74 Tex. 226; *Rose v. Tally*, 15 Wis. 443; Cobbey on Replevin, sec. 1063, p. 605.

Leslie Orear, for respondent.

(1) The judgment meets all the requirements of the statutes. R. S. 1889, secs. 7489–90; *Pope v. Jenkins*, 30 Mo. 528; *Chapman v. Kerr*, 80 Mo. 158. (2) It is not contended that the hogs and calves described in the judgment are not the same hogs and calves described throughout the record; the record as a whole sufficiently indicates and points out the specific property to be returned, and that is sufficient to support the judgment. *Coleman v. Reid*, 75 Iowa, 304; s. c., 9 Am. St. Rep. 484. (3) The Missouri statute does not contemplate that the jury shall state an account as to each item of property sought to be recovered in replevin, or that there shall be any finding except as to the aggregate value of the property in controversy; the position contended for would render it next to impossi-

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ble to fix values in replevin, so as to allow the successful party to make an intelligent election. Under our statute the unsuccessful party found in possession of the property has no right to return part and reduce the assessed value *pro tanto*. R. S. 1889, sec. 7489. Even in those states where the statutes require a separate finding, the failure of the court or jury to make such finding is waived by the adverse party unless objected to before the jury is discharged, and opportunity given to correct the finding and make it conformable to the statute. Cobbey on Replevin, secs. 1063–64; *Wingfield v. Wingfield*, 40 Miss. 369; *Hoeser v. Kraeka*, 29 Tex. 451; *Goldsmith v. Wilson*, 67 Iowa, 662; 35 N. W. Rep. 870; *Blake v. Powell*, 26 Kan. 320.

Ellison, J.—This is an action of replevin. The answer admitted plaintiff was entitled to a portion of the property, and denied his being so entitled to other portions. Judgment was rendered in defendant's favor for a large part of the property claimed by him in his answer, and plaintiff appeals. Many of plaintiff's points in the case cannot be considered, from the fact that the bill of exceptions was filed after the expiration of the time granted him for filing.

On the record proper we find no error justifying a reversal. The judgment, "that the defendant recover of plaintiff the said ninety-one hogs and three calves, or, at his election, take judgment for the sum of $442, the value of said property so adjudged to be returned to him," is a substantial compliance with the statute requiring the judgment to be in the alternative, though it is informal. R. S. 1889, sec. 7490. As the hogs and calves had been in other parts of the finding and judgment referred to as having been taken by the writ of replevin, we think the description of the property is not so vague as to invalidate the judgment.

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I. It is insisted that the finding and judgment should have assessed the value of each hog and calf separately, in order that, if plaintiff returned a part of them, it would be known how to credit the judgment. Without passing on such question we will say that even if the value of each separate article of personal property ought to be found by the jury the error in failing to so find is waived, if not objected to, at the return of the verdict. Cobbey on Replevin, secs. 1063–4.

We find nothing in other objections which we feel would justify us in disturbing the judgment, and it is accordingly affirmed. All concur.

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VANDYKE & CO., Respondents, v. W. M. WALKER, Appellant.

Kansas City Court of Appeals, April 4 and 25, 1892.

Real-Estate Agent: COMMISSIONS, WHEN EARNED. A real-estate agent is not entitled to commissions for a sale, made after the revocation of his authority to sell, or for a sale made to a purchaser not of his procurement.

Appeal from the Saline Circuit Court.—HON. RICHARD FIELD, Judge.

REVERSED.

Leslie Orear, for appellant.

(1) The second instruction given for the plaintiffs is erroneous in these particulars, viz.: It assumes as a fixed fact the right of plaintiffs to sell defendant's farm, at the time of the contract, when that is the very point in issue, inasmuch as defendant claims in his answer, and in the evidence which tended to show that he had previously revoked the authority of plaintiffs to

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act further under their employment, that he had withdrawn the farm from the market, when they proceeded to make the trade with Baker. The instruction is inconsistent with the instructions given for defendant, and cannot be harmonized with them, and assumes the controverted fact of the right to sell at the time plaintiffs acted, in three different phases; the instructions authorize the jury to find for plaintiffs though they may believe that defendant sold the farm himself, after revoking plaintiff's authority. *Wilkerson v. Thompson*, 82 Mo. 327, 328; *Peck v. Ritchey*, 66 Mo. 114; *Ins. Co. v. Academy*, 52 Mo. 480; *Rothschild v. Frensdorf*, 21 Mo. App. 318. (2) The court erred in refusing to give the instruction, numbered 3, asked for by defendant; it was a proper instruction, and was fully supported by the writing offered in evidence, as well as by the testimony of defendant and Baker. And the fourth instruction asked for by defendant should have been given by the court, as it properly defines the term advertisement used in the contract sued on. Bouvier's Law Dictionary [14 Ed.] 93, defining advertisement.

Alf. F. Rector, for respondents.

(1) The plaintiffs were entitled to the commission under either of the two theories presented: *First*, there can be no question as to the fact that Taylor made the sale to Baker, and that Baker was ready and willing to complete the purchase, and these facts would entitle Vandyke & Co. to their commission, although the sale was never completed; the same failing on account of Walker's refusal to make the deed. *Blaydes v. Adams*, 35 Mo. App. 526; *Harwood v. Diemer*, 41 Mo. App. 49. *Second*. If Baker's attention was brought to the land by the exertions of Vandyke & Co. they are entitled to the commission on said sale,

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although made by Walker. *Jones v. Berry*, 37 Mo. App. 125. (2) The question of whether or not Walker had, before September 2, the day Baker came to Marshall and Taylor sold him the farm, withdrawn farm from sale by Vandyke & Co. was submitted to the jury by instructions, numbered 1, 3 and 4, given for the plaintiffs, and by instructions, numbered 1 and 2, given for the defendant, and the jury found the issue for the plaintiffs; this settles the question, and this court ought not to disturb the finding. *Blaydes v. Adams, supra.*

GILL, J.—The plaintiffs, real-estate agents at Marshall, Missouri, sued the defendant to recover commissions on the sale of a farm in Saline county. Plaintiffs had a verdict and judgment for $400, and the defendant appealed.

The evidence discloses the following state of facts: On the eighth day of July, 1891, defendant employed plaintiffs to secure a purchaser for his farm of three hundred and twenty acres, at $50 per acre, agreeing to pay therefor a commission of two and one-half per cent. on the total proceeds of the sale. The contract between the parties was reduced to writing, and the conclusion thereof reads as follows:

"I reserve the right to sell the above property myself, without paying a commission; but if I sell to anyone whose attention was called to the property by said Vandyke & Co., or to whom they have shown the same, or who has been directed to it by their advertisement, their commission shall be due.

"Witness my hand and seal this eighth day of July, 1891.

"W. M. WALKER, [Seal.]".

The defendant claims that shortly after thus engaging plaintiffs to sell his land at $50 per acre he

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had a talk with Rainey, one of the plaintiffs, in which he revoked the authority to sell. However, about September 2, thereafter, one Baker, of Slater, Missouri, came to Marshall to look at the farm. He sought out defendant Walker and entered into negotiations for purchase of the land. They failed to agree in the afternoon, but separated with the understanding that they would meet again at the hotel in Marshall that night. Walker priced the land then at $55 per acre. Instead of meeting Walker, however, Baker went to plaintiff's office that night and they (Vandyke & Co.) signed a contract agreeing to sell the farm to Baker for $50 per acre. Plaintiffs claimed this authority under the contract of the previous July. The defendant repudiated this sale, so made by Vandyke & Co., with Baker, and refused to make a deed in accordance therewith. Subsequently, however, Baker and the defendant did come to terms, and the land was conveyed to Baker. Other portions of the testimony will be noted further on.

I. The evidence here discloses two well-grounded objections to any recovery by plaintiffs. In the first place, at the time when Vandyke & Co., in behalf of Walker, assumed to sell the land to Baker, and signed the contract for $50 per acre, they had no authority. The authority given July 8 had been revoked. Defendant seems all the time to have treated with plaintiff Rainey, who was one of the firm of Vandyke & Co. And Rainey himself testified that "after the contract (referring to the contract of agency) was made with us I had a conversation with Mr. Walker in reference to drawing the farm from sale. I said to him that I had carried a man over the farm, and that I thought he liked it pretty well, and I would not be surprised if he bought it; Mr. Walker said, 'Well, that is all right, but if you don't sell that farm to that man I am going to withdraw it, or I am going to raise on the price.'

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* * * The man whom I took over the farm was named Anderson; I remarked to Walker that I had carried a man over the farm, and that I thought he liked it right well; he said that was all right, but if I did not sell to him he was going to withdraw it, or advance on the price, or something like that. He might have said that if I did not sell to that man."

Defendant Walker on the same subject testified that a short time after giving the authority to Vandyke & Co. to sell the land for $50 per acre he "was in their office and believed it was at the time that the man Anderson was in there, and Rainey was going out to show him the place, and asked defendant to go along; in a week or ten days after that time he asked Rainey what success he had had with the man he showed the place to, and he said he believed the man liked the place pretty well, and did not know but what he would buy it; I said to him, 'If you make a sale to that man, all right; but if you don't sell to him I will not sell for less than $55 per acre,' that I had rented it out meantime, and did not want to sell; if I had thought it was necessary to take up the article of agreement I would have done so at that time; I thought that the place was withdrawn after they did not sell to that man; I rented the farm to my son, some time after I had placed it with Vandyke & Co., and on the first of September he had commenced to plow for wheat." And so it seems that when Baker approached Walker to buy the land the price *was* raised, and he declined to sell for less than $55 per acre. Now, the testimony of Rainey (one of the plaintiffs) and defendant Walker, quoted above, stands undisputed, and, indeed, is practically to the same effect. It shows conclusively that Walker did not intend to continue the authority with Vandyke & Co. to sell his land at the price fixed the prior July. He

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said, in effect, this much to Rainey, "You can sell to Anderson for $50 (since you have gone to some trouble on that account, etc.), but if he does not purchase then you are not authorized to offer such terms to others."

But further, even admitting authority in Vandyke & Co. to sell defendant's land, this purchaser, Baker, was not of their procurement. Vandyke & Co. did not secure this purchaser. He came from his home at Slater to Marshall to see the land and attempt a purchase by reason of information furnished by a neighbor, one Connell. It seems that Rainey had, prior thereto, offered the land to Connell, but Connell thought it high and declined to purchase. Subsequently, Connell mentioned the land to Baker, and thereupon Baker proceeded to investigate the matter. He went to Marshall, and finding Walker, the owner, began negotiations which were interrupted as already said by the interposition of one of the plaintiffs. It was through no effort or advertisement of the plaintiffs that Baker came to make the purchase.

The judgment herein will be reversed. All concur.

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C. H. Vanstone, Respondent, v. S. O. G. Hopkins, Appellant.

Kansas City Court of Appeals, April 25, 1892.

1. **Damages**: FAILURE TO DELIVER: MARKET PRICE. **In case of a** failure to deliver according to contract of sale, the **ordinary measure** of damages is the difference between the **contract price and the** market price of the goods at the time and place of **delivery; but,** where there is no market price at the place of delivery, the **market** price at the place to which they were to be sent, less the **cost of transportation** is the measure of their value at the place of delivery.

2. **Instructions:** ASSUMING FACTS: INAPPLICABLE RULE. An instruction should not assume a fact of which there is no evidence and thereby insert a rule inapplicable to the facts which the evidence tended to prove.

3. **Frauds and Perjuries:** VERBAL CONTRACT: SUFFICIENCY OF WRITTEN OFFER. The statute of frauds will apply if there is no part performance of the verbal agreement sued on; and a written proposition signed by the plaintiff only, addressed to no one, and about the acceptance of which there is some doubt, is not sufficient to withdraw the transaction from under the operation of the statute.

Appeal from the Saline Circuit Court.—HON. RICHARD FIELD, Judge.

REVERSED AND REMANDED.

Leslie Orear, for appellant.

The defendant's demurrer to the evidence should have been sustained; there was no proof of any sort offered at the trial, nor did the evidence tend to show that the defendant ever refused to deliver the wheat contracted for at Mt. Leonard in a reasonable time after the contract was entered into; this was a material point, and there was a total failure of proof on that point. *Groll v. Tower*, 85 Mo. 249; *Smith v. Shell*, 82 Mo. 215; 1 Greenleaf on Evidence [Redfield Ed.] secs. 66, 67. The demurrer to the evidence should have been sustained as the evidence shows that the contract for the sale of the wheat was within the statute of frauds; no sufficient written memorandum of the agreement was made in writing, signed by the party chargeable with the performance of the same, nor was any part of the consideration received by him, nor was plaintiff bound by the agreement to receive any part of the goods contracted for, or to pay for the same; both parties to the agreement should be bound, or neither will be bound by the agreement. The evidence fails to show that the sacks furnished, or to be furnished, constituted any

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part of the price to be paid for the wheat; they were simply furnished in aid of the proposed delivery, and it was not understood by any fair inference from the evidence that they were furnished as an inducement to the contract. Roberts on Frauds, p. 139; Browne on Statute of Frauds, secs. 8, 334*b*, 371, 371*a*, 377–78, 380; *Smith v. Shell, supra; Chrisman v. Hodges*, 75 Mo. 413; *O'Neill v. Crain*, 67 Mo. 250.

Alf. F. Rector, for respondent.

(1) In a case where the petition alleges a contract, and then also alleges part performance of the same, by both plaintiff and defendant, the defense of "statute of fraud" must be specially pleaded; it cannot be raised by objections to the evidence or by demurrer. Browne on Statute of Frauds, secs. 511, 518. (2) There was no such objection to the evidence in this case as would be if it were a proper case in which to raise the defense "of statute of frauds," by objecting to the evidence. The objection to the evidence was expressly made on the ground that the petition charged that the agreement was in writing, when in fact no such allegation is contained in the petition. (3) The question of what the contract was, was the issue. The jury found the issue for the plaintiff. The question of part performance was also found for plaintiff. Defendant's demurrer being overruled, he introduced his witness and presented his case. He cannot ask that this court review the ruling of the trial court. *Taylor v. Penquite*, 35 Mo. App. 389. (4) The defendant waived the plea statute of frauds by not pleading the same. This is the rule in Missouri. *Gardner v. Armstrong*, 31 Mo. 535; *Sherwood v. Saxton*, 63 Mo. 78; *Maybee v. Moore*, 90 Mo. 340. I submit the finding and judgment was for the right party, and ask an affirmance.

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SMITH, P. J.—The plaintiff sued defendant to recover damages for failing to deliver two thousand bushels of wheat to plaintiff under a verbal agreement. The plaintiff had judgment, and the defendant has appealed. The principal error of which defendant complains is in respect to the action of the trial court in instructing the jury that if they believed from the evidence that about the first day of August, 1891, defendant entered into an agreement with the plaintiff by the terms of which agreement defendant sold to plaintiff one thousand bushels of wheat at seventy-four cents per bushel to be delivered on board the Chicago & Alton railroad cars at Mt. Leonard station, said wheat to be paid for on a basis of seventy-four cents for number 2 wheat, St. Louis weights and grades to govern, and that as a part of the consideration for said wheat plaintiff agreed to furnish defendant with sacks to handle said wheat, and that plaintiff did as a part performance of his agreement furnish defendant with said sacks within a reasonable time after requested so to do by defendant; and that defendant on or about the twenty-first day of August, 1891, refused to comply with his said agreement, and refused to deliver said wheat, and did on or about said date notify the plaintiff that he declined to deliver said wheat, then your finding must be for the plaintiff, and you will assess his damages at the difference between the price agreed to be paid by the contract and the market value of the wheat at Mt. Leonard on the day defendant refused to deliver the wheat to plaintiff, not exceeding in amount the sum of $200.

The abstracts are entirely barren of any evidence tending to show that the plaintiff and defendant entered into an agreement, by the terms of which the defendant sold to plaintiff *one thousand bushels of wheat at seventy-*

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four cents per bushel. There was no evidence whatever to warrant the submission of the case to the jury upon such an hypothesis. Again the uncontradicted evidence shows that there was no market price for wheat at Mt. Leonard, the place where the defendant had agreed to make delivery under the terms of the sale. Such being the conceded fact, how could the court tell the jury, as it did, that if they found for plaintiff that they should "*assess his damages at the difference between the price agreed to be paid by the contract* and the market value of the wheat at Mt. Leonard on the day defendant refused to deliver it." It is quite true that the ordinary measure of damages is the difference between the contract price and the market price of the goods at the time and place where they should be delivered. *Griffith v. Const. Co.*, 46 Mo. App. 539; *White v. Saulsbury*, 33 Mo. 150; *Koeltz v. Bachman*, 46 Mo. 320; *Northup v. Cook*, 39 Mo. 208; *Rickey v. Tenbroek*, 63 Mo. 563; *Harrison Wire Co. v. Hardware Co.*, 97 Mo. 289. But where the goods have no market price at the place of delivery, the market price at the place to which they were to be sent, less the cost of transportation, is the measure of their value at the place of delivery. Sedgwick on Damages [8 Ed.] sec. 246; Benjamin on Sales [American notes by Bennett] 859, and cases there cited; *Johnson v. Allen*, 78 Ala. 387. There was no evidence whatever offered showing the costs of transportation of wheat per bushel from Mt. Leonard to St. Louis where it was to be sent. So that the rule declared by the court for the government of the jury in that regard was inapplicable under the facts which the evidence conduced to prove.

Again the undisputed evidence was that the defendant agreed to sell the plaintiff his crop of wheat. He did not agree to deliver a specific number of bushels,

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but only so many bushels of good, sound wheat as his crop would yield when subsequently threshed. If it graded number 2, then he was to receive seventy-five cents per bushel; if it should turn out, upon inspection, to be of a different grade, then no price was fixed. But this did not establish a price for the wheat if the grade was other than number 2. Now there was no evidence of the quality of defendant's wheat. The plaintiff had never seen it. It was not shown what it graded, or would have graded, in the market. There was an utter absence of evidence touching its quantity. Yet the court by its instruction directed the jury to find the difference between what the plaintiff agreed to pay for it and its market value in St. Louis. It may not have graded in St. Louis number 2. It may have been of a much lower grade. The instruction assumed that the defendant's wheat was number 2 in grade, when there was not a syllable of evidence tending to prove it. If it was number 3, then it would have been worth, as the plaintiff testified, from four to six cents less per bushel. This would have reduced the amount of the damages claimed that much. We must condemn this instruction as asserting a rule inapplicable to the facts which the evidence tended to prove. It should not have been given.

As the cause will be remanded it is proper to remark that the cause of action is not based upon a written contract, but, if it were, the written proposition or offer of the plaintiff already referred to would not be sufficient to withdraw the case from under the operation of the statute of frauds. It was signed by the plaintiff only, addressed to no one, and, besides, there is some doubt whether it was accepted by the defendant. It was not signed by the party sought to "be charged therewith," nor is it sufficient in form or contents to meet the requirements of the statute. Browne on Statute

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of Frauds, secs. 345, 345*a*, 371, 371*a*, 372, 373. It has no place in the case that we discover. The plaintiff's third instruction should, therefore, not have been given.

Of course the statute of frauds would apply if there is no part performance of the verbal agreement sued on shown in the evidence.

The judgment will be reversed and the cause remanded. All concur.

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THE CITY OF SEDALIA, Appellant, v. JOHN B. GALLIE, Respondent.

Kansas City Court of Appeals, April 25, 1892.

Municipal Corporations: THIRD-CLASS CITIES: ASSESSMENT OF BENEFITS: NAME OF LOT-OWNER. In cities of the third class in assessing benefits for the opening and extension of streets, the statute requires the assessment to be made in the name of the owner of the lot benefited, and separately against each lot with the benefit chargeable to it; and the property-owners should be served with personal notice of the appointment of the jury of freeholders to make the assessments, as, where a statute requires notice without prescribing the method of service, personal notice is intended.

Appeal from the Pettis Circuit Court.—HON. RICHARD FIELD, Judge.

AFFIRMED.

John Cashman, for appellant.

(1) No direct adjudication is required as to ownership, and the omission of defendant's name in connection with the assessment against his property, resulting in no prejudice whatever to his property rights, and he being personally present when the

assessment was made, and in full possession of all notice that an assessment in his name could possibly impart, the tax bill being issued in his name, and he being properly made a defendant in this suit, is all that can be required, and he is now estopped from any attempt to escape the payment of this tax, by which the value of his property has been greatly enhanced, on account of an alleged irregularity which was committed, if at all, in an attempt to particularly meet and comply with the spirit of the law, which specially intends and provides that the property and not the person shall be liable for the price of the improvement. *Seibert v. Allen*, 61 Mo. 582; *Gray v. Railroad*, 31 Mo. 126. (2) The notice to property-owners, published in the official city paper, whose property was to be assessed benefits, was sufficient, and were it insufficient the defendant cannot complain, for the reason that he was personally present before the commissioners at the time of the hearing and assessment; knew the amount of the same, knew that it was assessed to him, and that it was assessed against the particular lots or parcels of ground sought to be charged, and he thereby waived any defect in the notice; and if he felt aggrieved his only remedy was an appeal from the assessment and finding of the said jury of freeholders. *Sheehan v. Owens*, 82 Mo. 458; *Creamer v. McCune*, 7 Mo. App. 91; *Allen v. Rodgers*, 2 Mo. App. 290; *Kemper v. King*, 11 Mo. App. 116, 129. (3) This is a suit strictly *in rem*, and it is not necessary that the assessment should be made by the jury of freeholders in the name of anyone; it is only required that the suit, when instituted for the purpose of fastening the lien of the tax bill upon the property, should provide a personal defendant, and this does not mean that it must, in order to render the judgment valid, be brought against the real owner, *Vance v. Corrigan*, 78 Mo. 94.

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G. W. Barnett, for respondent.

(1) There is no assessment against anyone, but the assessments of the freeholders read in evidence simply assess a list of town lots. The assessment should be against the owner. He is the one who is presumed to be benefited, and who has the assessment to pay. He is assessed with reference to his property, and with reference to his benefits. Hence, the assessment read in evidence is void. R. S., sec. 1524, pp. 434, 435; *Abbott v. Lindenbower*, 42 Mo. 162; *Gaines v. Fender*, 82 Mo. 497, and authorities there cited; *Newby v. Platte Co.*, 25 Mo. 258; *Whitney v. Thomas*, 23 N. Y. 281; Cooley on Taxation, 278; 2 Desty on Taxation, p. 1328; *Taylor v. Donner*, 31 Cal. 480; *Hammelan v. Hoadley*, 44 Cal. 480; 2 Desty on Taxation, pp. 1241, 1242, and authorities there cited; *Taylor v. Donner*, 31 Cal. 480; *Smith v. Davis*, 30 Cal. 536; *People v. Utica*, 7 Abb. (N. C.) 414; *Stockton v. Whitmore*, 50 Cal. 554; *Allen v. Galveston*, 51 Tex. 318; Elliott on Roads & Streets, p. 371; *Vance v. Railroad*, 30 Ark. 439; *Nelson v. LaPorte*, 33 Ind. 258; *Caldwell v. Rupert*, 10 Bush (Ky.) 182; *City of St. Louis v. Rankin*, 96 Mo. 507. (2) No personal notice was given to defendant in this case of the appointment of the jury of freeholders. The statute (sec. 1524) requires notice to be given to the owner of the appointment of the jury of freeholders, and, when notice is required by statute without prescribing the method of service, personal notice is intended. *Ryan v. Kelly*, 9 Mo. App. 396; *Corneli v. Partridge*, 3 Mo. App. 575; *Fowler v. St. Joseph*, 37 Mo. 238. And the fact that defendant may, in fact, have known of the appointment of the jury, is not sufficient. (3) There were four lots assessed together, and one sum assessed against them all, instead of assessing a certain amount against each

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lot separately. Such an assessment is void. *Fowler v. St. Joseph, supra; St. Louis v. Clemens*, 49 Mo. 552; *Corporation of Washington v. Pratt*, 8 Wheat. 682.

Gill, J.—This suit is on a special tax bill based upon an alleged assessment of benefits against lots 8, 9, 10 and 11 in block 2 of the original plat of the city of Sedalia, for the opening and extending of Ohio street northward. The city by ordinance prescribed a district within which benefits might be assessed, and a jury of freeholders were appointed to assess damages and benefits. Sedalia is a city of the third class and the proceeding giving rise to the issue of the tax bill in suit is claimed to be authorized by sections 1514 and 1524, Revised Statutes, 1889, and certain ordinances claimed to be passed in pursuance thereof.

The evidence at the trial disclosed that the only notice given to this and other property-holders that a jury of freeholders had been appointed to assess benefits, and of the time and place when they would hear evidence and make the assessment, was by publication in a newspaper, and that the ordinance prescribed the giving of the notice by publication, and provided for no other notice. At the trial the assessment of the jury of freeholders read in evidence shows that they assessed lots 8, 9, 10, 11, block 2, the sum of $75, but makes no assessment against this defendant or any other person, nor was any owner named. The lots are not separately assessed, but the four were assessed $75 in the aggregate without specifying the burden to be borne by each.

The defendant urges the following objections against the tax bill: "*First.* Because the defendant is not assessed, but that the lots in question are simply assessed as being benefited, without being assessed in the name of anyone as owner. *Second.* That the

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assessment of a gross amount against four lots, instead of fixing the amount on each lot separately, renders the assessment void. *Third.* That the notice should have been by personal service, instead of by publication." The cause was tried before the court sitting as a jury, judgment was rendered for defendant, and the plaintiff city appealed.

I. Section 1514, Revised Statutes, 1889, grants authority to cities of the third class (to which Sedalia belongs) to open, widen or extend streets, etc.; "provided that all damages sustained by the citizens of the city or the owners of property therein shall be ascertained as prescribed in section 1524," etc. Turning then to said section 1524, provision is made for condemnation proceedings and for the appointment of five disinterested freeholders to make the assessment of damages and benefits and proceeds: "And, in determining the same, said jury of freeholders shall consider the benefits resulting to, as well as the damages sustained by, the owner of the property so taken; and said jury of freeholders shall, moreover, estimate the amount which other persons owning adjacent property within the limits hereinafter provided will be benefited thereby, who shall contribute toward compensating the person injured, and such assessment shall constitute a lien in favor of the city on the said adjacent property, all of which shall be returned under their hands and seals; and the person or persons who shall be benefited and so assessed shall pay in such manner as shall be provided by general ordinance, and the residue, if any, shall be paid out of the city treasury. * * * And the owners of private property within such limits shall be notified of the appointment of said jury of freeholders."

This statute clearly directs the naming of the land charged with benefits. When then the commissioners

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sought to charge defendant Gallie's lots, the assessment should have been against him as owner. But the report here shows that no mention was made of the owner; the lots were assessed, but Gallie's name as owner was entirely omitted. This, of itself, is sufficient to invalidate said assessment in so far as defendant's lots are concerned. *Abbott v. Lindenbower*, 42 Mo. 162–167; *Gaines v. Fender*, 82 Mo. 507, 508; *Taylor v. Donner*, 31 Cal. 480; *Whitney v. Thomas*, 23 N. Y. 285–6. These proceedings are subject to a strict construction; every substantial requirement of the law must be complied with or the owner's land cannot be charged. 2 Desty on Taxation, 1241; Cooley on Taxation, 276. It matters not that personal judgment cannot be had against the owner for these local assessments; the statute must be obeyed. If it is provided thereby that in making such assessment it shall be charged against one as the owner of the land, then no lien is created unless such provision is followed. *Seibert v. Allen*, 61 Mo. 488.

II. Again, this attempted charge on defendant's lots must fail because the benefits were assessed against four parcels of property altogether in one gross sum. Clearly, these lots should have been separately assessed with the benefit chargeable to each. *Fowler v. City of St. Joseph*, 37 Mo. 227; *City to use of McGrath v. Clemens*, 49 Mo. 552.

Neither was such notice given to the defendant as the statutes provides. Section 1524 reads: "The city authorities shall, before the appointment of said jury of freeholders, define by ordinance the limits within which private property is benefited by said change, etc., * * * and the owners of private property within such limits *shall be notified* of the appointment of said jury of freeholders." Where the statute requires notice without prescribing the method of

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service, personal notice is intended. *Ryan v. Kelly*, 9 Mo. App. 396. This statute then, which is the organic and controlling law of Sedalia, demands personal service of notice on the owner whose land is to be assessed with benefits. The publication, therefore, in a newspaper did not fill the requirement of this statute, and, hence, was no notice at all. And so the ordinance of Sedalia providing for such notice by publication is clearly void as being in conflict with the city charter. "The legislature may prescribe what the manner of the notice shall be; and when the statute so provides its terms must be complied with in order to a valid assessment." *City of St. Louis v. Rankin*, 96 Mo. 506.

Judgment affirmed. All concur.

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THE STATE OF MISSOURI, Respondent, v. JOHN McLAIN, Appellant.

Kansas City Court of Appeals, April 25, 1892.

1. **Statutory Construction:** RULES. In this case the following rules of statutory construction were applied: "A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." "Penal statutes are always to be strictly construed for the benefit of the citizen." "A statute ought to be so construed that no man who is innocent can be punished or endangered."

2. **Selling Liquor:** MINOR: ORDER: PRINCIPAL. A sale of intoxicating liquor to a minor under an order disclosing his principal is a sale to the principal, and not to the minor; but a sale to a minor without an order disclosing his principal is a sale to the minor, even though the liquor be, in fact, for the principal, nor would the minor's statement at the time of the sale, that he was purchasing for another, take the sale out of the statute.

Appeal from the LaFayette Criminal Court.—HON. JOHN E. RYLAND, Judge.

AFFIRMED.

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Hicklin & Welborn, for appellant.

(1) The trial court erred in refusing to give instruction, numbered 2, for the defendant. 2 Bouvier's Law Dictionary [15 Ed.] p. 606, title, Sales; p. 353, title, Parties; 1 Bouvier's Law Dictionary [15 Ed.] p. 392, title, Contracts; p. 134, title, Agency; 1 Parsons on Contracts [6 Ed.] top p. 519. A sale of liquor to a minor for his parent's use is not a sale to the minor. *Commonwealth v. Latterville*, 120 Mass. 385 (1876); *Milling Co. v. Ins. Co.*, 25 Mo. App. 259; *Bank v. Lanergan*, 21 Mo. 48; *Belt v. Goode*, 31 Mo. 128.

William Aull, for respondent.

(1) The positive and uncontradicted testimony of James Kelly is that he purchased whiskey four times at defendant's saloon. The last two times he purchased a half pint each time, and had no order of any kind. Catron, who sold at the bar to Kelly, states Kelly had only two orders. At the last two purchases nothing was said excepting that the whiskey was called for by the minor, money paid and whiskey delivered. No principal was disclosed. *People v. Garrett*, 36 N. W. Rep. 234; *Commonwealth v. Fowler*, 14 N. E. Rep. 457; *Page v. State*, 4 S. Rep. 697; *Siceluff v. State*, 11 S. W. Rep. 964; *Gillan v. State*, 47 Ark. 555; 2 S. W. Rep. 185; *Foster v. State*, 45 Ark. 365; *Richter v. State*, 63 Miss. 304; *Ross v. People*, 17 Hun, 591; *Commonwealth v. McGuire*, 11 Gray, 160. (2) The statute applies with equal force whether the minor purchased for himself or for his brother. The defendant had no written permission from the parent at the time that he sold or disposed of the intoxicating liquor to the minor. R. S. 1889, ch. 56, p. 1047, sec. 4588; p. 1048, sec. 4589. The object and spirit of the statute is to protect

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and relieve the boys and young men of the state from the evil influences and contagious contaminations of the dramshop. *State v. McGinnis,* 38 Mo. App. 19; *State v. Morton,* 42 Mo. App. 64.

SMITH, P. J.—The defendant was indicted and convicted in the LaFayette county criminal court for selling liquor to a minor. The evidence showed that John Kelly, an adult, wrote an order for liquor to the defendant by James Kelly, his brother, who was a minor; that defendant furnished liquor on said written order, and charged the same to John Kelly, who afterwards paid defendant for it. The court refused to instruct the jury that this was a sale to John Kelly and not a sale to James Kelly, the minor. The evidence further tends to show that the defendant made two other sales to said minor, without a written order from anyone. While in the latter instance the liquor was purchased for the use of the minor's adult brother, it does not appear that the minor disclosed the name of his principal at the time of the sale to him, or that defendant knew that fact.

Section 4588, Revised Statutes, upon which the indictment is based, is a penal one, and is to be strictly and fairly construed and not to be extended beyond cases clearly within both its letter and spirit. "A thing which is within the letter of a statute is not within the statute unless it be within the intention of the maker." "Penal statutes are always to be strictly construed for the benefit of the citizens." "A statute ought to be so construed that no man who is innocent can be punished or endangered." 4 Bacon on Abridgement, "Statutes."

Applying these rules, we cannot think the facts of this case bring it within the intent and spirit of the statute. We think the sale made to the minor under

an order disclosing his principal was a sale to the principal. It was not such a sale to the minor as falls within the prohibition of the statute. But in the instances where the minor purchased the liquor without disclosing the name of his principal for whom he made the purchases, the law presumed that the purchases were made for his own use. The mere fact, that he was making the purchase under such circumstances for the use of another, would not destroy this presumption. Nor would the statement if he had made it, that he was making the purchase for another, overturn this presumption, since he could not establish his agency by his own declaration of that fact. *White v. Middlemarch*, 42 Mo. App. 368; *Dill v. Railroad*, 37 Mo. App. 454.

In our opinion, the sale made to the minor in the cases where the latter produced the order of his brother was not within the statute, and, therefore, the defendant's second instruction, which was refused, should have been given.

But for this error we will not reverse the judgment, since it sufficiently appears that the defendant made two other sales to said minor without any disclosure by the latter that he was acting for a principal who might lawfully purchase. Such sales being within the letter and spirit of the statutory prohibition, we must affirm the judgment. All concur.

49	401
50	406
49	401
64	186
49	401
72	33
73	498
75	621
49	401
86	553
49	401
100	723

ISAIAH NICHOLS, Appellant, v. T. C. CARTER, Respondent.

Kansas City Court of Appeals, April 4 and 25, 1892.

1. **Practice, Trial:** CONCLUSIONS OF LAW AND FACT: STATUTE: APPELLATE PRACTICE. Section 2135, Revised Statutes, 1889, is practically the same as section 2 in the practice act of 1849; and makes it the duty of the court, at the request of either party to state in

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writing its finding of facts and conclusions of law thereon separately, which become a part of the record proper, and, if the finding of facts does not support the judgment, the appellate court will reverse for error apparent on the record; such finding of facts is a substitute for a special verdict, though not so critically considered, and facts will only be presumed when they can be legally presumed from the facts found.

2. ——:——: OBJECT OF STATUTE: EFFECT ON APPELLATE PRACTICE. The object of the statute in reference to the court's conclusions of law and fact is to permit parties to make a case for the revision of the appellate court in which the facts and the law appear separately without instructions or bills of exceptions, but, in order to attack the finding of facts, the evidence must be preserved in a bill of exceptions.

3. ——:——: INSTRUCTIONS. Under the statute relating to the court's finding separate conclusions of fact and law, the court must declare the conclusions of law, on the facts found only, and such conclusions do not fully take the place of instructions, and the court need not state hypothetical states of fact. and the law thereon, after the manner of instructions.

4. **Practice, Appellate:** CONCLUSIONS OF LAW AND FACT: EVIDENCE SUPPORTING SAME. With the propriety of the finding of facts by the trial court, so long as they have testimony tending to support them, the appellate court has nothing to do.

Appeal from the Johnson Circuit Court.—HON. CHAS. W. SLOAN, Judge.

AFFIRMED.

William W. Wood, for appellant.

The paper purporting to be a finding of facts separate from the conclusions of law wholly fails to comply with the statutes. Revised Statutes, 1889, section 2135, contemplate that the court shall state its conclusions of law as well as fact. The conclusions of law are intended to answer the place of instructions to a jury. *Railroad v. Johnson*, 10 Ohio St. 591, 595; *Major v. Major*, 2 Kan. 337; *Lacy v. Dunn*, 5 Kan. 567; *Briggs v. Eggan*, 17 Kan. 589; *Everet v. Lusk*,

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19 Kan. 195; *Building Ass'n v. Thompson*, 19 Kan. 321; *Railroad v. Ferry*, 28 Kan. 686; *Russell v. Arwarder*, 2 Cal. 405; *Hoogland v. Clark*, 2 Cal. 474. Here no conclusions of law were stated, and it is impossible to determine upon what theory the court tried the case. As to whether the court tried the case upon the theory that plaintiff was bound to prove that his influence and exertions were the sole moving power that induced the compromise and judgment, or whether it was only necessary for him to show that he used his best endeavors to that end, we are left wholly in the dark, thus failing to declare his position on the vital and controlling point in the case.

O. L. Houts, for respondent.

(1) The court sitting as a jury found as facts that plaintiff failed to find any additional evidence in case of *Doran v. Barrett*, and that he did not influence the defendant in that cause to make settlement, and that he did not secure the judgment rendered therein; but that the settlement and judgment were procured by other influences than the exertions of plaintiff Nichols. This being an action at law, this finding is as the verdict of a jury, and will not be set aside, although it might appear to the appellate court to be against the weight of the evidence. *Walton v. Railroad*, 40 Mo. App. 544. This is true when the evidence *in hæc verba* is presented by the appellant in his abstract, but where, as in this case, appellant fails to present all the evidence in his abstract, the appellate court cannot and will not attempt to determine as to the weight of the evidence, and the finding will be taken as conclusive. *Nichols v. Nichols*, 39 Mo. App. 291; *Bank v. Davidson*, 40 Mo. App. 421; *Calvert v. Bates*, 44 Mo. App. 626. (2) The special finding of the court is sufficient. It found facts against plaintiff that barred his recovery,

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and entered judgment against him, which was the sentence or conclusion of law upon the facts found, and a sufficient statement of that law.

Ellison, J.—This action is based on a contract whereby plaintiff undertook to effect a compromise of certain litigation then pending in the circuit court of Henry county. The trial was before the court, without a jury, resulting in a judgment for defendant. The principal point made by plaintiff is with reference to the finding of the facts and the conclusions of law therefrom, as determined by the court. The statute on this subject was adopted in Acts, 1849, page 90. It was dropped out of the revision of 1855 and revived in 1889. The act of 1849 read as follows:

"Sec. 2. Upon a trial of a question of fact by the court, its decision shall be given in writing and filed with the clerk. In giving the decision, the facts shall be first stated, and then the conclusion of law upon them. Judgment upon the decision shall be entered accordingly."

The present statute of 1889 is as follows:

"Sec. 2135. Upon the trial of a question of fact by the court, it shall not be necessary for the court to state its finding, except generally, unless one of the parties thereto request it with a view of excepting to the decision of the court upon the questions of law or equity arising in the case, in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law."

Under this statute the duty of the court (when the parties so request) is practically the same as in 1849. It is the duty of the court, at the request of either party, to state, in writing, its findings of fact and conclusions of law thereon separately. *Griffith v. Construction Co.*, 46 Mo. App. 539; *Major v. Major*, 2 Kan.

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337; *Railroad v. Johnson*, 16 Ohio St. 591; *Railroad v. Ferry*, 28 Kan. 686; *Russell v. Arwarder*, 2 Cal. 305.

This written statement of conclusions of fact and law becomes a part of the record proper, and, if the finding of facts does not support the judgment based thereon, we will reverse the judgment for error apparent on the record (*Sutter v. Streit*, 21 Mo. 157; *Allison v. Darton*, 24 Mo. 343); though no exception be taken. *Downing v. Boulier*, 21 Mo. 149. The finding of facts is a substitute for a special verdict (*Bates v. Bower*, 17 Mo. 550; *Farrar v. Lyon*, 19 Mo. 123), though it is not considered so critically as is a special verdict. *Downing v. Boulier, supra.* Facts will be presumed when their existence may *legally be presumed from* the facts found by the court. Otherwise, the presumption will not be made. *St. Louis Bldg. Ass'n v. Williams*, 19 Mo. 612. The object of the statute is to permit parties to make a case for the revision of an appellate court, in which the facts and law would appear separately, without requiring instructions or bills of exceptions. *Bailey v. Wilson*, 29 Mo. 21. This must mean, at least as applied to our present practice act, that the complaining party concedes there was evidence tending to support the finding. For, if that is not conceded, and the finding is attacked as not having evidence to support it, such evidence must be preserved by bill of exceptions. So, if the finding of facts is attacked as not embracing all the issues of fact, that should also be made to appear by a bill preserving the evidence; as, frequently, issues made by the pleadings are not contested or afterwards referred to; and, when the court omits, in the finding of facts, issues made by the pleading, it should be presumed that no such issues were made by evidence. In this case there is a bill of exceptions, and we will pass upon the points preserved.

The court did make a separate finding of facts,

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and upon those facts entered judgment for the defendants. The facts, as found, only made it necessary to pronounce the legal result following those facts, and that was done in the judgment entered. In this case a single conclusion of law resulted from the facts found; and a single conclusion was all which it was necessary to state. It is not contemplated by the statute that the trial judge shall give his reasons for his conclusion, but merely to state what that conclusion is.

It is urged, in support of the contention, that the conclusion of law found by the court did not cover all the legal questions in the case; that such conclusions take the place of declarations of law.' This is only partly correct. The court must state the conclusion of law on the *facts found only.* No more than this was meant in *Bailey v. Wilson, supra.* It is not the duty of the court to state what would have been its conclusion of law if certain other facts had been found. The court need not state hypothetical states of fact and the law thereon, after the manner of instructions.

We do not find that the record discloses that the trial court tried the case upon the theory that plaintiff's efforts must have been the sole cause of the compromise. In our judgment, the court drew the proper conclusion of law from the facts found. Our interpretation of the contract is that, to entitle plaintiff to recover, the compromise must have been the result of his effort, though not necessarily solely from his effort. The facts disclosed by the finding show that his effort did not contribute to the result. With the propriety of finding these facts, so long as they have testimony tending to support them, we have nothing to do. A careful examination of the record discloses to us that we would not be justified in disturbing the finding on the evidence, under the rule of law governing appellate courts. We find no substantial error in the objections made, and, therefore, affirm the judgment. All concur.

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THE STATE OF MISSOURI, Respondent, v. SAMUEL WEBB, Appellant.

Kansas City Court of Appeals, April 25, 1892.

1. **Local Option:** ELECTION WITHIN FORTY DAYS. An election for the enforcement of the local-option law must be held within forty days of the presentation of the petition to the county court, and if held after that time it is void.

2. ———: WITHDRAWAL AND RE-PRESENTATION OF PETITION. A petition for the enforcement of the local-option law was presented on July 10, and an order made for an election in the county excluding two towns, supposed to have twenty-five hundred inhabitants each. On August 1, a part of the petitioners moved the court to set aside the order for the election which was done; and thereupon they withdrew the petition and at once again presented it, and an election was ordered for August 31, in the county and one of the towns excluded in the prior order. *Held*, an idle performance; that there was only one petition presented, and that was on July 10, which then served its purpose and from that time on was powerless to institute another such proceeding.

3. ———: ELECTION OVER COUNTY: NO OMITTED PRECINCT. Under the local-option statute the election must be held in every portion of the county over which the law is intended to operate, and, if any precinct, entitled to vote is omitted, the entire election is void. *Semble*, it would appear that the order of election should show that an omitted precinct is not entitled to vote.

Appeal from the Cass Circuit Court.—HON. CHAS. W. SLOAN, Judge.

REVERSED.

R. T. Railey and *Wm. L. Jarrott*, for appellant.

(1) The election was void because the city of Pleasant Hill was not permitted to vote on the question. "That one entitled to vote shall not be deprived of the privilege by the action of the authorities, is a

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fundamental principle." Cooley's Constitutional Limitations [4 Ed.] sec. 616, p. 766; *People v. Mynard*, 15 Mich. 47; *Larring v. Carpenter*, 20 N. Y. 477. Where the order for an election and the notice given under it leaves out any precinct in the county which is entitled to vote on the proposition involved, the entire election is void, even if all the votes of said precinct could not have changed the result. *School Dist. v. District Twp.*, 17 Iowa, 85; *Exparte Kennedy*, 3 S. W. Rep. (Tex.) 114; McCrary on Elections, sec. 120; *Barry v. Lauck*, 5 Cold. 588; *Secord v. Foutch*, 44 Mich. 89; *Attorney General v. Supervisors*, 11 Mich. 63; *Foster v. Scarff*, 15 O. N. S. 532; *People v. Solomon*, 46 Ill. 415. (2) "Courts will not take judicial notice of the local adoption of the local-option law, but it must be established by evidence as any other fact is proved." *City of Hopkins v. Railroad*, 79 Mo. 98; *State v. Buster*, 90 Mo. 514; *State v. Mackin*, 41 Mo. App. 99. (3) The petition was presented to the county court of Cass county to submit the question of local option on the tenth day of July, A. D. 1888. A special election was ordered to be held on the seventeenth day of August following. The court then ordered a special election to be held on the thirty-first day of August. They ordered this special second election on the identical petition that was received by the county court on the tenth of July, and ordered the special election to be held fifty-two days after the reception of the petition. When a petition to determine whether spirituous and intoxicating liquors shall be presented to the county court, "the county court of such county shall order an election, * * * to take place within forty days after the reception of such petition." R. S. 1889, sec. 4598; *Exparte Sublett*, 23 Tex. Ct. App. 309; 4 S. W. Rep. 894; 13 S. W. Rep. 752; *State ex rel. v. Ruark*, 34 Mo. App. 325; McCrary on Elections [2 Ed.] 125.

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J. F. Lynn, for respondent.

(1) By the local-option law it is made the duty of the county court to determine what towns or cities in the county have twenty-five hundred inhabitants or more, and when the court has determined that question, and ordered the election, its action in the matter is conclusive, at least in a proceeding like this, or in a collateral proceeding it must be taken and presumed that every necessary step preliminary to the action or requisite to any particular action of the court has been complied with. R. S. 1889, sec. 4598; *French v. Fyan*, 93 U. S. 169; *Johnson v. Townsley*, 13 Wall. 72; *Cruz v. Martinez*, 8 Cent. Law Jour. 1; *State ex rel. v. Simmons*, 35 Mo. App. 378; *State ex rel. v. Weatherby*, 45 Mo. 17; *State v. Emery*, 3 S. E. Rep. 810; *State v. Searcy*, 39 Mo. App. 401; *Riggins v. O'Brien*, 34 Mo. App. 613. (2) Where a court, although of inferior or limited jurisdiction, or a mere ministerial board, is required to find the existence of a fact *in pais*, in order to warrant it to do what it does, it will not be presumed for the purpose of overthrowing its jurisdiction, in the silence of its record, that the fact did not exist, but the general presumption of right acting which attends all official bodies will obtain in such a case, and it will be presumed that the act did exist, until the contrary is made to appear in a direct proceeding. The county court, by the local-option law, is required to find what cities or towns in the county have twenty-five hundred or more inhabitants at the time the petition is presented to the court, and the court must have found that Pleasant Hill had twenty-five hundred or more inhabitants, and that Harrisonville had less than twenty-five hundred inhabitants on the first day of August, 1888. R. S. 1889, sec. 4598; *State v. Searcy*,

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39 Mo. App. 293; *State v. Hutton*, 39 Mo. App. 410; *Riggins v. O'Brien*, 34 Mo. App. 613; *State ex rel. v. Weatherby*, 45 Mo. 17; *Snoddy v. Pettis Co.*, 45 Mo. 361; *State v. Evans*, 83 Mo. 319; *State ex rel v. Young*, 84 Mo. 90. (3) The election on the adoption of the local-option law was held in Cass county, Missouri, outside of the corporate limits of the city of Pleasant Hill in said county, within forty days after receiving the petition; the petition was filed with the county court on the first day of August, 1888, and the election was held on the thirty-first day of August, 1888.

Gill, J.—Defendant Webb was indicted, tried and found guilty of selling intoxicating liquor in Cass county outside the corporate limits of Pleasant Hill, in violation of the provisions of the local-option law, alleged to have been adopted in said county outside the limits of any city having a population of twenty-five hundred, and has appealed to this court. The question for our determination is: "Has the local-option law been legally adopted in Cass county?"

I. Several objections are urged against the validity of the proceedings, two of which, at least, we consider well taken. Section 4598, Revised Statutes, 1889 (which is the first section of the local-option law), provides that, "upon application by petition signed by one-tenth of the qualified voters of any county who shall reside outside the corporate limits of any city or town having, at the time of such petition, a population of twenty-five hundred inhabitants or more, * * * the county court of such county *shall* order an election to be held in such county at the usual voting precincts for holding any general election for state officers, *to take place within forty days after the reception of such petition*, to determine." * * * Now it seems that on July 10, 1888, the petition of J. N. Haddock

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and others (in all about eighteen hundred qualified voters of Cass county) was presented to the court praying the court to order an election to determine whether or not the local-option law should be adopted in the county outside the limits of cities having a population of twenty-five hundred or more. At that time the court and people, it seems, generally understood that Harrisonville and Pleasant Hill both had more than twenty-five hundred inhabitants, and, hence, would not be included within the operation of the law, if adopted.

Immediately upon reception of the petition of these eighteen hundred voters, and on said July 10, the county court ordered an election as prayed, to occur on August 17, thereafter. The court proceeded further to appoint the judges for election to be held as ordered on said August 17. Some three weeks after receiving and acting upon this petition (that is, on August 1), the county court, on the motion of Haddock and a few others of said petitioners, set aside the order of election made on July 10, assigning as a reason that the census of Harrisonville was that day declared invalid by the circuit court of Cass county. Thereupon, Haddock and others, assuming (but without any authority) to act for the petitioners throughout the county, withdrew the petition which had been presented on July 10, and forthwith, on said August 1, presented the same to the court, who then and there on the same petition made another order for an election to be held on August 31, 1888. It was upon this election held upon the thirty-first day of August, fifty-two days after the petition was first presented, that the prosecution here bases a claim that Cass county, outside of Pleasant Hill, but including Harrisonville, is subject to the provisions of the local-option law. It is now claimed by the defense, and we think correctly, that this election held on August 31 is void because it occurred more than forty

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days after the petition was *presented* to the county court.

By the terms of the first section of the law (which we have quoted above) it is the unqualified mandate of the statute that the county court "*shall* order the election to be held in such county * * * to take place within *forty days* after the reception of such petition." If, then, this petition was presented to, and received by, the county court, on July 10 (and this is unquestionably true), then an election held in pursuance thereof on August 31—fifty-two days after the reception by the court—was beyond the period fixed by the statute, and, hence, said election was unauthorized and void. This exact point was so held by the St. Louis Court of Appeals in *State ex rel. v. Ruark*, 34 Mo. App. 325. In a well-considered opinion by Judge BIGGS, it was there decided that an election under the local-option law will be void, if appointed and held on a day more than forty days after receipt by the county court of the petition of such election. The statute is mandatory, not merely directory. To the same effect, see decision by the court of appeals of Texas. *Ex parte Sublett*, 4 S. W. Rep. 894.

But it is urged by counsel for the state that the election held on August 31 was in pursuance of a petition presented August 1. This brings us now to consider what effect shall be given the performance of that date. Laid bare and unconcealed, the whole matter was this: On July 10, 1888, about eighteen hundred voters living throughout Cass county presented their petition to the county court looking to the enforcement of local option in the county *outside* of the two cities of Harrisonville and Pleasant Hill. All then were of the opinion that both these towns had twenty-five hundred inhabitants, or more, and, hence, under the law, it was conceded that each of these cities was

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entitled to fix its own status in the sale or prohibition of intoxicating liquors. The county court acted on this petition and ordered the election to occur on August 17. Subsequently (August 1), owing to some decision by the circuit court, it occurred to some of those who had signed the petition, that Harrisonville did not have the requisite population, and a few of the petitioners of July 10 went before the county court and successfully moved a revocation of the order of July 10; and, then with one hand withdrew the petition which had been presented and acted on July 10, and with the same hand immediately passed it back to the county court as a new petition.

We regard this as a mere idle performance. There was only one petition presented, and that was on July 10. It then served its purpose, and from that time on was powerless to institute another such proceeding. The eighteen hundred signers to that petition had presented the same to the county court, and it had been acted on, under the common understanding that there was to be an election looking to the enforcement of prohibition only in that portion of Cass county outside of Harrisonville and Pleasant Hill. A few of these signers attempted before the county court to withdraw the petition and offer it for another and different purpose; that is, to enforce this prohibition in Harrisonville as well as other portions of the county.

It was all the time the same petition. It was lodged with the court on July 10, and would serve under the law a basis for the order of an election to be held within forty days after said July 10, but not later.

II. There appears, too, on the face of this record, another fatal objection to this proceeding to adopt local option in Cass county outside of the corporate limits of any city or town having twenty-five hundred inhabitants. It is clear under the provisions of the local-

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option statute, that if it is desired to adopt this law in any county outside the limits of cities having twenty-five hundred or more population, then the election must be held in every portion of the county over which the law is intended to operate; otherwise we should have a *portion* only of the territory of a county fixing the governmental status of the entire county, and this manifestly cannot be done. *Bean v. County Court*, 33 Mo. App. 622, 644. Now it appears from the only evidence offered below, to-wit, the records of the United States census, that at the time of said election in Cass county, Pleasant Hill (an incorporated city of said county) had a population of less than twenty-five hundred. But, strangely, the county court, in ordering said election, excluded the territory occupied by Pleasant Hill. For what reason does not appear, as there was no finding by said court that Pleasant Hill had twenty-five hundred inhabitants or more. If then Pleasant Hill had a population less than twenty-five hundred, then it was subject to the operation of the law; and, if subject thereto, it was clearly entitled to participate in the election. Defendant's counsel need no citation of authorities to sustain the claim made in their brief, that where the order for an election, and the election as held, should leave out any precinct in the county which is entitled to vote on the proposition involved, then the entire election is void.

It results then, from the foregoing considerations, that the judgment of the lower court must be reversed and the defendant discharged. All concur.

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COLBURN & HAMILTON, Plaintiffs in Error, v. THE BRUNSWICK FLOUR COMPANY, Defendant in Error.

Kansas City of Appeals, April 25, 1892.

1. **Evidence:** REJECTION OF, WHEN NON-PREJUDICIAL. When the admission of evidence could not vary the result, its rejection is non-prejudicial.

2. **Practice, Appellate:** ABSTRACT OF EVIDENCE: DEMURRER. In order for the appellate court to review the action of the trial court in refusing to give a peremptory instruction, the evidence must be set out in the abstract.

3. ———: ABSENCE OF JUDGE: MOTION FOR NEW TRIAL. While it is improper for a trial judge, with or without consent, to absent himself from the court-room during argument, still the judgment cannot be impeached on that account unless such impropriety is made one of the grounds of the motion for a new trial.

4. ———: OBJECTION: EXCEPTION: REMARKS OF COUNSEL: TEMPORARY JUDGE. Though remarks of counsel be improper, unless objection is made to the judge (though a temporary one) there is nothing on which to base an exception for appellate review.

Appeal from the Chariton Circuit Court.—HON. G. D. BURGESS, Judge.

AFFIRMED.

Ashley & Gilbert, for plaintiffs in error.

(1) The checks of Canine & Co., to Balch's order, and indorsed by him (which indorsement he admitted to be genuine), offered in evidence by plaintiff in rebuttal, were clearly admissible, *first*, because they threw light on Balch's relation to the Brunswick Flour Company, and, *secondly*, for the reason that they directly contradicted the testimony of defendant Balch.

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1 Greenleaf on Evidence [13 Ed.] sec. 462; 5 Wait's Actions & Defenses, p. 113, and cases therein cited. (2) When law and evidence are as overwhelmingly in favor of plaintiff as in this case, an appellate court will remand cause for failure of trial court to give peremptory instructions for plaintiff. *Runnell v. Hayes*, 83 Mo. 200; *Morris v. Barnes' Adm'r*, 35 Mo. 412. (3) It is reversible error for trial judge to leave the courtroom during the argument of counsel to jury, even though counsel consent. 1 Thompson on Trials, p. 211; *Davis v. Wilson*, 65 Ill. 525–530; *Brownlee v. Hewitt*, 1 Mo. App. 360; *State ex rel. v. Claudius*, 1 Mo. App. 551. (4) The action of an attorney in appealing to the prejudices of juries, in his argument, to facts foreign to the controversy, unless rebuked by the court, is ground for new trial. *Gibson v. Zeibig*, 24 Mo. App. 65; *State to use v. Finn*, 24 Mo. App. 345; *Fathman v. Tumilty*, 34 Mo. App. 236; 16 American & English Encyclopedia of Law, pp. 526–8; *Martin v. Orndorff*, 22 Iowa, 504; *Ins. Co. v. Cheever*, 36 Ohio St. 210; *Trustees v. Shaw*, 100 Ind. 268.

Tyson S. Dynes, for defendant in error.

(1) The checks of Canine & Co., to whom Balch, after taking the stock of goods for his debt, sold out, could have no possible bearing in this case, in rebuttal, or for any other purpose. (2) Where the evidence is not all set out the court will not consider any question as to failure of trial court to give peremptory instruction. And especially so when the record does not show that any such was asked or refused. *Bensberg v. Turk*, 40 Mo. App, 227; *Shaw & Co. v. Bryan*, 39 Mo. App. 523; *Kamerick v. Castleman*, 20 Mo. App. 658; *Riggins v. O'Brien*, 34 Mo. App. 613. This court will not reweigh the evidence. (3) This

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court will not pass upon the question as to whether or not it was error for the trial judge, by consent of counsel, to leave the arguments to be presided over by a special judge. The point is not made in the motion for new trial. R. S. 1889, ch. 63, sec. 2302, p. 590; *Railroad v. Carlisle*, 94 Mo. 166; *Schultz v. Railroad*, 32 Mo. App. 438; *Bank v. Landis*, 34 Mo. App. 433; *Lemoine v. Cook*, 33 Mo. App. 193; *Atkinson v. Dixon*, 96 Mo. 582. (4) As to the questions of the alleged improper remarks of counsel, this court has nothing to pass upon, for the following reasons: *First*. The language is not set out. Only a vague statement thereof is made by one individual who claimed to have been at the argument. *Second*. Although a special judge was presiding, by consent, no objection was made nor exception saved. *State v. Taylor*, 98 Mo. 240; *State v. West*, 95 Mo. 142; *State v. Carter*, 98 Mo. 176; *Railroad v. North*, 31 Mo. App. 351; *Sidekum v. Railroad*, 93 Mo. 400. Even the misconduct of a juror is held to be no ground for reversal unless exception is saved. *Leeser v. Boekhoff*, 38 Mo. App. 444.

SMITH, P. J.—This was a suit brought by plaintiffs against defendants, partners doing business under the name of the Brunswick Flour Company, to recover $434.56 upon a bill of exchange drawn by plaintiffs on and accepted by the Brunswick Flour Company. The defendant Balch in his answer under oath denied that he was at any time a partner or member of the firm known as the Brunswick Flour Company. The abstract does not set forth all the evidence, but only such parts of it as tend to support the plaintiffs' contention. It sets forth no part of the defendant's evidence except so much of the testimony of defendant Balch as was elicited on cross-examination. The defendants had judgment and plaintiffs have appealed.

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I. The first ground of the plaintiffs' complaint is that the trial court erred in rejecting the plaintiffs' offer to introduce in rebuttal the checks of Canine & Co. in favor of defendant Balch. These checks were all dated after the one sued upon. They at most prove no more than Balch testified to himself. He testified, in effect, what the checks were for and that they were paid. They were more corroborative than contradictory of Balch. They were not offered in chief, but only in rebuttal. It is not perceived that the action of the court in any way was prejudicial to plaintiffs. The admission of the checks could not have varied the result.

II. The plaintiffs complain further that the trial court erred in refusing to give a peremptory instruction to the jury to find for them. If it is necessary that all the evidence be set out in the abstract in order to enable us to determine upon the propriety of the action of the trial court in the giving of a peremptory instruction as we have decided (*Christopher v. White*, 42 Mo. App. 429), it follows that a like necessity exists when such an instruction has been refused. Such evidence is as essential in the one case as in the other. How can we tell whether the instruction should have been given or not unless we could see all the evidence? The plaintiff should have set out the evidence as required by rule 15 of this court. *Goodson v. Railroad*, 23 Mo. App. 76; *State v. Pace*, 33 Mo. App. 458. Besides this the abstract neither sets forth the instruction nor the ruling of the court thereon.

III. While it is improper for a trial judge, with or without the consent of counsel, to abdicate the bench and absent himself from the court-room during their argument before the jury, still the judgment cannot be impeached on that account unless such impropriety is made one of the grounds of the motion for a new trial,

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which does not appear to have been done in this case. R. S. 1889, ch. 33, sec. 2302, p. 290; *Railroad v. Carlisle*, 94 Mo. 166; *Schultz v. Railroad*, 32 Mo. App. 438; *Bank v. Landis*, 34 Mo. App. 433; *Lemoine v. Cook*, 36 Mo. App. 193.

IV. The remarks alleged to have been made to the jury by counsel for the defendant were in some respects improper and should not have been made, but since the plaintiff did not interpose an objection thereto before the temporary judge then presiding, there was nothing upon which to base an exception. We can only review the action of the trial court in those cases where an exception has been taken and preserved thereto. *Sidekum v. Railroad*, 93 Mo. 400; *State v. Pagel*, 92 Mo. 300; *Leeser v. Boekhoff*, 38 Mo. App. 445.

It follows that the judgment must be affirmed. All concur.

JAMES BYRD, Appellant, v. DAVID A. STEELE *et al.*, Respondents.[1]

Kansas City Court of Appeals, April 25, 1892.

1. **Mechanics' Lien:** JUSTICES' COURTS: SERVICE OF PROCESS. The finding by a justice that the defendant has absconded from his last usual place of abode, and cannot be found in this county, is not sufficient to authorize an order of publication as it does not appear that defendant could not have been summoned by leaving a copy of the summons at his usual place of abode, etc.

2. **Justices' Courts:** NOTICE OF APPEAL. Service of notice of appeal on the attorney who appeared for the appellee at the trial before the justice is sufficient.

Appeal from the Buchanan Circuit Court.—HON. A. M. WOODSON, Judge.

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AFFIRMED.

Kelley & Kelley, for appellant.

(1) The service by publication upon David A. Steele was sufficient. It was not based on the return of the summons against Dudley A. Steele, but was ordered at the date of the issuance of the summons. It is clear that the justice had sufficient evidence that the defendant, David A. Steele, had absconded and could not be summoned. "If any defendant cannot be summoned (if he has absconded, left the state or cannot be found) the justice must enter an order on his docket requiring the plaintiff to give notice," etc. Kelley's New Treatise [Ed. 1890] p. 667. The motion of plaintiff to affirm the judgment of the justice should have been sustained. It is affirmatively shown by the bill of exceptions that Keller was not the proper person to serve with notice of appeal at that time, and such service was not sufficient. The statute does not contemplate a case of this kind. It means that where no change in the attorneys has taken place notice of appeal may be served on attorney who appeared at the trial at the justice's court. Not where an attorney may have become incapacitated, or from other causes may have withdrawn from the case and is not longer connected with it, and the party appealing has knowledge of that fact. It cannot be presumed that Keller continued as the attorney of plaintiff, for the reason that defendant Hartzell had information to the contrary. Lawson on Presumptive Evidence, 172. Otherwise, such presumption would have been proper. *Southard v. Nelson*, 43 Mo. App. 210. There was notice of appeal from the judgment of the justice of the peace served on plaintiff or his attorney, and the judgment of the justice should

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have been affirmed. *Southard v. Nelson*, 43 Mo. App. 210; *Crosby v. Clary*, 43 Mo. App. 222, and cases cited.

Luke H. Moss, for respondents.

All authority justices have for the enforcement of mechanics' liens is given them by article 4, of chapter 94, Revised Statutes, 1889. Section 6160 of this article provides that the process and proceedings in such cases shall be, as nearly as practicable, the same as provided by law in other suits before justices of the peace. R. S. 1889, sec. 6136. No summons was ever issued in this case for David A. Steele; but summons was issued for Dudley A. Steele. This could not authorize the justice to make his order of publication for David A. Steele, because he is only authorized to do so if David A. Steele cannot be summoned as provided by section 6163, Revised Statutes, 1889. Appellant intimates that Steele had absconded from his last usual place of abode, etc., but a copy of the summons left at the usual place of abode, etc., would bring him into court and authorize judgment against him for respondents' benefit. There is no provision of our statutes authorizing the justice to make an order of publication upon affidavit of non-residence, or that defendant had absconded, or after hearing evidence of these facts—the order of publication in this case was without authority of law. Contractor Steele is a necessary party to this suit. 50 Mo. 158; 19 Mo. App. 38; R. S., sec. 3180. The appeal from the justice by respondent Hartzell could not cure the defective service on contractor Steele. Notice of the appeal was served on the attorney who signed the original petition, and who appeared in the justice's court as directed by section 6342, Revised Statutes, 1889. Service of this notice on Kelley & Kelley would not have been good under the statute.

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Ellison, J.—This action was begun before a justice of the peace to enforce a mechanic's lien. It was instituted against David A. Steele, the contractor, and Josephine Hartzell, the owner of the building on March 20, 1890. Josephine was served with process. No summons was issued against David A. Steele. The following is the entry made by the justice on his docket, ordering service by publication: "March 20, 1890. Comes now the plaintiff by attorney, and it being made to appear to James Mitchell, a justice of the peace before whom the above case is now pending, that the above-named defendant, David A. Steele, has absconded from his last usual place of abode and cannot be found in this county. Now, therefore, in compliance with the order of said justice duly made in the premises and entered on his docket," etc.

Defendant Josephine filed a motion, in the circuit court, to dismiss because of no sufficient service on Steele. The motion was sustained, and plaintiff appeals. The point made to sustain this action of the trial court is that there was no authority in the justice to make an order of publication, without first issuing a summons against the defendant and having a return of *non est.* Sections 6160 and 6136 of the statutes are relied upon. Section 6160 relating to mechanics' liens before justices of the peace provides that the process and proceedings in such case shall be, as nearly as practicable, the same as provided by law in other suits before justices. Section 6136 provides that suits may be instituted before justices of the peace, either by voluntary appearance or by process; and process is defined to be either a summons or an attachment against the defendant's property. Whether these sections make it a prerequisite to an order of publication, that the justice shall first issue a summons, we need not decide, though such we

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believe to have been the practice. We need not decide it in this case, from the fact that here, conceding that the justice can find the defendant cannot be summoned by other means than a return of a summons *non est*, yet it does not appear from the entry made by the justice that defendant could not be summoned. He found that defendant had "absconded from his last usual place of abode, and cannot be found in this county." This might all have been true, and yet defendant could have been summoned under section 6148, by the constable leaving a copy of the summons at defendant's usual place of abode with a member of his family above the age of fifteen years. We shall sustain the action of the trial court in this respect.

II. The next complaint is that error was committed in not sustaining plaintiff's motion to dismiss defendant's appeal, on account of a failure to give notice of appeal. The notice was served on the attorney who attended to plaintiff's case before the justice, but who was not his attorney at the time of service of notice. In *Ellis v. Kyes*, 47 Mo. App. 155, we held such a service good under the statute, as amended in section 6344, Revised Statutes, 1889.

The judgment will be affirmed. All concur.

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D. S. SPRAGUE, Appellant, v. THE WESTERN HOME INSURANCE COMPANY, Respondent.

Kansas City Court of Appeals, April 25, 1892.

Insurance: OCCUPANCY: WAIVER: LIMITATION OF AGENT'S AUTHORITY. Where an insurance policy provides that it shall become void, if, without permission in writing, the building became vacant, etc., and that no agent can waive, modify, erase or strike out any condition,

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stipulation or restriction, nor bind the company by any act or statement, the ceasing to use and occupy the premises in question in the manner as shown when the policy was taken out, without written permission, indorsed on the policy, avoided it; and no act of the local agent can be used to modify or change the plain terms of the contract.

Appeal from the Buchanan Circuit Court.—HON. HENRY M. RAMEY, Judge.

AFFIRMED.

Brown & Craig, for appellant.

(1) Henry is described in the policy as the "duly authorized and regularly commissioned agent." The terms of the policy itself acknowledge the liability of the company "for the acts of any person who may procure this insurance," provided he shall be "the duly commissioned and lawfully authorized agent of the company." The court erred in holding that Henry could not waive the condition of the policy (if it is a condition) with reference to the use of the building as a livery stable, by virtue of his general authority as agent, as expressed by the terms of the policy and implied from his general power to effect the insurance. The law is firmly settled to the contrary in this state. *Stavinow v. Ins. Co.*, 43 Mo. App. 513; *Bernard v. Ins. Co.*, 38 Mo. App. 106; *Hamilton v. Ins. Co.*, 94 Mo. 353; *Pelkington v. Ins. Co.*, 55 Mo. 172; *Russell & Co. v. Ins. Co.*, 55 Mo. 585. In this case the waiver is nothing more nor less than a construction of the words of a contract of insurance that the agent himself made on behalf of his principal. *Hotchkiss v. Ins. Co.*, 44 N. W. Rep. (Wis.) 1106. (2) The word "livery barn," as used in this policy, is simply a descriptive term, and constitutes no warranty as to the future use of the building. *Wood v. Ins. Co.*, 13 Conn. 533; *Billings v. Ins. Co.*, 20 Conn. 139.

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H. W. Chase, for respondent.

(1) The policy in suit is an entirety, and, being void in part, is void *in toto*. *Smith v. Ins. Co.*, 23 N. E. Rep. (N. Y.) 883; *McQueery v. Ins. Co.*, 12 S. W. Rep. (Ark.) 498; *Garver v. Ins. Co.*, 69 Iowa, 202. (2) The agent's authority is limited by the policy in suit, and it is therein provided: "This company shall not be bound under this policy by any act of, or statement made to or by, any agent or other person, which is not contained in this policy, or in written papers hereto attached." The appellant was bound by such inhibition. *Ins. Co. v. Heibuk*, 46 N. W. Rep. (Neb.) 481; *Cook v. Ins. Co.*, 47 N. W. Rep. (Mich.) 568; *Smith v. Ins. Co.*, 15 Atl. Rep. (Vt.) 353; *Weidert v. Ins. Co.*, 24 Pac. Rep. (Ore.) 242; *Ins. Co. v. Fletcher*, 117 U. S. 519; *Hallis v. Ins. Co.*, 65 Iowa, 454; *Cook v. Ins. Co.*, 70 Mo. 610. The Missouri cases cited by counsel are not in point.

Gill, J.—The defendant insured the plaintiff's livery barn and contents. The property was destroyed by fire, the defendant denied liability and this suit was brought. At the close of the evidence the court instructed the jury that the plaintiff was not entitled to recover, whereupon plaintiff suffered an involuntary nonsuit, and brings the case here by appeal.

I. The main defense is based on this provision of the policy: "This policy shall be void and of no effect, if, without permission therefor in writing hereon, the building or any portion thereof, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied or cease to be operated or used daily for the purposes stated in this policy, unless permission therefor be indorsed in writing hereon; then, in each

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and every case, the insurance under this policy immediately ceases and determines."

When the risk was taken the building was used and occupied as a livery stable, and it was so stated in the policy. But a few months thereafter, and about five months prior to the fire, plaintiff secured another building for his livery business, and moved from the insured building. In the words then of the policy, the building "ceased to be operated or used daily for the purposes stated in the policy," and, too, without permission therefor indorsed in writing on the policy, as by its terms provided.

This the insured plaintiff practically admits, but seeks to avoid the consequences named in the policy by the claim of a waiver, that the local agent who wrote the policy knew the facts, and made no objection thereto. The defendant company replies to this, that by the express terms of the policy the local agent was not authorized to waive this or any other stipulation in the contract of insurance. The restrictions on the powers of the agent are thus provided in the policy: "*Agents.*—No agent of this company has any authority to waive, modify, erase or strike out any of the printed conditions, stipulations or restrictions of this policy. Nor will this company be liable under or by virtue of this policy for the acts of any person who may procure this insurance, unless such person is the duly commissioned and lawfully authorized agent of the company. Agents for this company have no authority to make any verbal agreements whatsoever for or on behalf of this company."

Further it is set out in the insurance contract, that "this company shall not be bound under this policy by any act of or statement made to or by any agent or other person which is not contained in this policy, or in written papers hereto attached."

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It is clear that if we are to give effect to the foregoing, if we are to enforce this contract in accordance with its plain terms, just as made and agreed to by the parties, then the plaintiff cannot maintain this action. The plaintiff agreed that no act, declaration or agreement of the defendant's local agent could be used to modify, strike out, waive or in any way impair the conditions of the insurance contract. While it is true that "insurance companies doing business by agencies at a distance from their principal offices are responsible for the acts of their agent within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals which are not brought to their knowledge" (*Ins. Co. v. Wilkinson*, 13 Wall. 322), yet it is as well settled "that the company has the right and power to restrict as it may choose the powers and duties of its agents; and, when the authority is expressly limited and restricted by the policy which the insured receives, there can be no good reason in law or equity why such limitations and restrictions shall not be considered as known to the assured, and binding upon him. When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no right to contract as agent of the company with the assured so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing, and the holder of the policy is estopped from setting up or relying upon the powers in the agent in opposition to the limitations and restrictions in the policy." *Cleaver v. Ins. Co.*, 65 Mich. 527; *Cook v. Ins. Co.*, 47 N. W. Rep. 568.

And while the courts of this state have gone far in the direction of permitting a waiver by the insurance company, by and through the acts of its officers and

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agents, yet this right of the company to limit by express provision in its policy the agent's authority is all the time conceded. *Barnard v. Ins. Co.*, 38 Mo. App. 114; *Barnes v. Ins. Co.*, 30 Mo. App. 550.

We must hold then that when plaintiff ceased to use and occupy the premises in question in the manner as when the policy was taken out, his right to indemnity ceased, and that no act of the local agent can be used to modify or change the plain terms of the insurance contract.

We have considered all the points made and authorities cited in counsel's brief, and conclude that the trial court ruled correctly, and we, therefore, affirm the judgment. All concur.

JOHN W. V. WHITEHEAD, Respondent, v. COLE & RODGERS, Appellants.

Kansas City Court of Appeals, April 25, 1892.

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1. **Justices' Courts:** APPEAL: AFFIDAVIT: JURISDICTION. Section 6330, Revised Statutes, 1889, requires the affidavit of appeal from a justice's court to state whether the appeal is from the merits or from an order or judgment taxing costs, and, unless it so states, it is insufficient to confer jurisdiction on the circuit court.

2. **Appeals:** JURISDICTION. In every case of appeal it is essential to the jurisdiction of the appellate court that the appeal be taken in the manner prescribed by law, otherwise the appellate court has no jurisdiction to examine the merits.

Appeal from Buchanan Circuit Court.—HON. A. M. WOODSON, Judge.

REVERSED.

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F. S. Winn, for appellant.

As to the second ground alleged in the motion in arrest we wish to call the attention of the court to section 6330, Revised Statutes of Missouri, 1889.

J. W. V. Whitehead, for respondent.

SMITH, P. J.—This was an action of replevin brought before a justice of the peace, where the defendants had judgment, and the plaintiff filed an affidavit for an appeal to the circuit court, in conformity to the requirements of section 3043, Revised Statutes, 1879. This affidavit was made on the twentieth day of June, 1890, and, therefore, after Revised Statutes, 1889, went into effect.

Section 6330 of the last-named revision requires that the affidavit, in addition to what was required by 3043, Revised Statutes, 1879, shall further state "*whether such appeal is from the merits, or from an order or judgment taxing costs.*" On account of this omission and imperfection in the affidavit, according to our ruling in *Spencer v. Beasley*, 48 Mo. App. 97, the circuit court did not acquire jurisdiction of the subject-matter of the action. The defendants appeared in the circuit court, and made no objection there to the jurisdiction, but here for the first time they raise that question.

In every case of an appeal from one court to another it is a fundamental principle that it is essential to the jurisdiction of the appellate court that the appeal was taken in the manner prescribed by law, and that, where it is not so taken, the appellate court has no jurisdiction to proceed to an examination on the merits. *Queen v. Costello, Adm'r*, 35 Mo. App. 127. And it has

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been held that an appeal not taken in time from a justice confers no jurisdiction on the circuit court, though both parties appear. *Robinson v. Walker*, 45 Mo. 117; *Moon v. Minkler*, 3 Mo. App. 596; *Bauer v. Cabanne*, 11 Mo. App. 114; *McQuoid v. Lamp*, 19 Mo. App. 153; *Ewing v. Donnelly*, 20 Mo. App. 6.

The subject-matter of the trial before the justice of the peace was *res adjudicata*. The circuit court could not acquire jurisdiction of it except in the manner required by law. It could not be reopened in any other way. Jurisdiction of the subject-matter cannot be acquired by consent. It is quite different from the acquisition of jurisdiction of the person. The cases just cited sustain this view.

As the circuit court failed to acquire jurisdiction of the subject-matter of the trial before the justice on account of the insufficiency of the affidavit for the appeal, it must necessarily follow that its judgment must be reversed.

All concur.

JOHN GEHLING, Appellant, v. THE CITY OF ST. JOSEPH, Respondent.

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Kansas City Court of Appeals, April 25, 1892.

Municipal Corporation: SECOND-CLASS CITIES: CHANGING STREET GRADES. In cities of the second class the grade of streets can only be changed by ordinance passed by the counsel and approved by the mayor; and the city will not be liable for the filling of a street above the grade by persons assuming to act under its authority.

Appeal from the Buchanan Circuit Court—HON. HENRY M. RAMEY, Judge.

AFFIRMED.

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Porter & Woodson, for appellant.

If the paving of Frederick avenue was authorized by ordinance of the city it is liable for damages resulting to plaintiff from the carelessness, negligence or unskilfulness of its agents in performing the work so authorized. Elliott on Roads & Streets, 352; *Wegman v. City of Jefferson*, 61 Mo. 55; 1 Shearman & Redfield on Negligence, sec. 271; *Gibson v. Zimmerman*, 27 Mo. App. 90; 2 Dillon on Municipal Corporations [4 Ed.] secs. 990, 991; *City of Akron v. Chamberlain Co.*, 34 Ohio St. 328; *City of Cincinnati v. Penny*, 21 Ohio St. 499. The petition states a cause of action. "A plaintiff is only bound to allege in his petition what he is bound to prove to make his *prima facie* case." *Crane v. Railroad*, 87 Mo. 588.

Huston & Parrish, for respondent.

The city of St. Joseph is a city of the second class. Grades can only be established by ordinance, and grading can only be done by ordinance. R. S. 1889, sec. 1404, p. 406. Unless such change of grade is authorized by ordinance the city is not responsible for either in an action at common law or under the constitution of the state. *Werth v. Springfield*, 22 Mo. App. 12; *Stewart v. City of Clinton*, 79 Mo. 603; *Werth v. Springfield*, 78 Mo. 107; *Thompson v. Boonville*, 61 Mo. 282; *Rowly v. Gallatin*, 75 Mo. 134; *Hilsdorf v. St. Louis*, 45 Mo. 94. The statute under which the case of *Imler v. Springfield*, 30 Mo. App. 669, was decided does not apply to cities of the second class. Unfortunately, cities of the second class are expressly exempted from its operation, and, therefore, comes the avalanche of litigation now upon the defendant. R. S. 1889, sec. 1822; Sess. Acts, 1885, p. 49.

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Gill, J.—The substance of plaintiff's petition is that on and prior to March 1, 1887, he owned certain lots and houses on Frederick avenue, St. Joseph; that said houses were built to conform to the established grade of said street; but that at about said date the defendant city "by its careless, negligent and unskilful manner of executing the work of paving said street in front of said lots on said avenue, to-wit, *raised the roadway thereof at said point three feet* and raised the roadway of the same up above the doorway of said houses," etc., thereby rendering said property less valuable and damaging the same to the extent of $2,000, for which plaintiff prayed judgment.

At the trial, defendant's counsel objected to the introduction of any evidence on the ground that the petition failed to state any cause of action. Upon an admission of plaintiff's counsel in open court at the time that there was no ordinance of the city authorizing any change of grade of the street mentioned, the court sustained defendant's objection; and thereupon plaintiff took a nonsuit with leave; and, after an unsuccessful motion to set the same aside, plaintiff has appealed to this court.

St. Joseph is a city of the second class (and it is so alleged in plaintiff's petition), and, by the terms of its charter, the authority to change the grade of its streets rests alone with the mayor and common council. This power, too, can only be exercised by *ordinance* passed by the council and approved by the mayor.

We have here now this plaintiff seeking to hold the defendant city liable for damaging his property by a change of street grade in front thereof, when it is admitted that no ordinance was ever passed providing for any change of grade. The mere statement of the claim carries on its face a denial of any right on the part of the plaintiff to recover. The use of the words

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"negligence" and "unskilfulness" in the petition does not change the nature of the complaint. The negligence charged is that of *changing the grade* of the roadway in front of plaintiff's lots. The defendant has not changed the grade. This could only be accomplished by the passage of an ordinance, and it is admitted that there was no such ordinance. If persons assuming to act under authority of the city went upon the street in front of plaintiff's property and constructed an embankment so as to leave the abutting houses below the surface, they, and not the city, are liable. As said in a leading case: "It is undoubtedly true that the defendant can only be held responsible for the acts of its officers, agents or servants in changing the grade of a street, *when such change has been authorized by ordinance.*" *Werth v. Springfield*, 78 Mo. 109; s. c., 22 Mo. App. 12; *Stewart v. City of Clinton*, 79 Mo. 603; *Thompson v. Boonville*, 61 Mo. 282.

The circuit court ruled correctly, and its judgment is affirmed. All concur.

THE BRICK & TERRA COTTA COMPANY, Respondent, v. GEO. C. HULL, Appellant. 49 433 / 100 *302

Kansas City Court of Appeals, April 25, 1892.

1. **Municipal Corporations:** SECOND-CLASS CITIES: LIABILITY FOR STREET IMPROVEMENT: STREET RAILWAY. By sections 1404, 1405 and 1406, the costs of all work on streets, etc., shall be charged as a special tax on lands on both sides of and adjoining the streets, etc., and no statute authorizes a special tax bill to be made out against the property of a street railway company for any part of the costs of an improvement made in a street over which it has built its track; such railway company has the right to remove its tracks from the street, and can in such event be in no way liable for the improvement of such street.

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2. ——— : ——— : MATERIAL IN STREET IMPROVEMENT CONTRACT: ESTOPPEL. **A defendant in an action to enforce a special tax bill is estopped to object that after the bids were made and accepted artificial stone was used instead of natural stone, as required in the contract, and that the council fixed the price thereof, when such substitution was made by the council at his request, and such artificial stone was used on his property with his actual knowledge and acquiescence.**

3. ——— : ——— : IMPROVEMENT CONTRACT PERFORMED BY ANOTHER: ASSIGNMENT. **Where a contract for street improvement has been substantially performed, it can make no difference that the work was performed by another; and in this case it appears that the trial court did not err in refusing to tell the jury if they found there had been an assignment of the contract there could be no recovery.**

Appeal from the Buchanan Circuit Court.—HON. HENRY M. RAMEY, Judge.

AFFIRMED.

Spencer, Burnes & Mosman, for appellant.

(1) The court below should have directed a verdict for appellant. By section 1270 of the Revised Statutes of 1889, and under section 2 of special ordinance number 599 of the city of St. Joseph, it was the duty of the street-car company to pay for that portion of the street improvement between the tracks and eighteen inches on either outside. *Farrar v. St. Louis*, 80 Mo. 393. (2) Further we desire to add, as a reason why the trial court should have directed a verdict for appellant, these facts, as shown by the evidence: The general ordinances of the city provide the mode to be followed and the material to be used in street improvements, and that there were no specifications on file in the office of the city engineer, specially prepared for the work contemplated by the ordinance, at the time the ordinance was passed. That the city engineer instead of following the provisions of the general ordinance as they existed at the time the bids

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were received chose to accept bids upon a contract (which he calls the specifications), prepared a long time prior for work on another street. The special ordinance, which is the basis of the tax bill sued on, did not refer, because it could not refer, to any specifications in the engineer's office, other than those which had prior thereto been adopted by the common council. These facts, under the rulings in the case of *Galbreath v. Newton*, 30 Mo. App. 380, made it the duty of the court below to order a finding for appellant, and are here submitted as a ground of reversal. (3) For another reason the trial court should have ordered the jury to find for appellant. We submit that under the authority of the last-mentioned case, which quotes approvingly *People v. Board*, 43 N. Y. 227, the contract upon which the tax bill was issued was not such as was advertised for bidders; but, on the contrary, the contract was changed and amended by the common council without advertisement and without authority. *Galbreath v. Newton, supra.* (4) We wish further to maintain that when the contract, upon which a tax bill is issued, is introduced in evidence, and the terms and conditions of said contract were not complied with, but the express terms thereof have been violated by the contractor, and such violation conclusively shown, that no recovery can be had by the party attempting to enforce such tax bill. The contract which the successful bidder entered into with the city contained the express provision that no "assignment, transfer or subletting" should take place; but the contractor, in violation of such stipulation, and possibly because of the change of the contract by the common council, did "transfer, assign and sublet" his contract to one Henry Dunn. (5) It was not claimed and will not here be claimed by respondent that the item for curbing could be recovered, except on the ground of

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estoppel; and we maintain that none of the evidence admitted to prove an estoppel was competent. It is admitted that artificial stone for curbing was at no time contemplated until the council by its order directed the change in the contract, and appellant was estopped from denying the validity of such change, because at a time subsequent to such change he expressed himself as willing to have artificial stone in front of his property. No knowledge on his part of such change was attempted to be shown, and we, therefore, submit that the principle of estoppel has no application. *Galbreath v. Newton, supra.*

B. R. Vineyard, for respondents.

(1) In suits like this, seeking to recover for street improvements, only substantial compliance with the law is required. *Sheehan v. Owen,* 82 Mo. 458; *St. Louis v. DeVore,* 44 Mo. 139; *City of St. Joseph v. Anthony,* 30 Mo. 542; *Cole v. Skrainka,* 105 Mo. 309; s. c., 37 Mo. App. 420; *Kiley v. City of St. Joseph,* 67 Mo. 491. (2) Contracts for street improvements are assignable. *City of St. Louis v. Clemens,* 42 Mo. 69; *Leahy v. Dugdale,* 27 Mo. 437; *Sheehan v. Owen,* 82 Mo. 461. The exercise of the right of the city, under the contract for the work sued for, to annul the contract and relet the work, if it should be assigned by the contractor, was optional. The city did not, and was not bound to, exercise the right of annulment, even if the proof had shown an assignment. The city accepted the work and issued the tax bills. It waived the right to forfeit the contract. Bishop on Contracts, secs. 94–100, 789–797; *Bernard v. Ins. Co.,* 38 Mo. App. 107. (3) Besides there was no assignment of the contract in this case—simply an employing of Dunn by the contractor to do the work for him, the contractor still

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being liable on his bond and still looking after the work to see it well done. The tax bills were assigned by the contractor to plaintiff. Such assignment is specially provided for by the statute. 1 R. S., sec. 1407. (4) Including in the tax bills more than is properly due to the contractor will not invalidate the bills. *Neenan v. Smith*, 60 Mo. 292; *Bank v. Arnoldia*, 63 Mo. 229; *Bank v. Nelson*, 64 Mo. 418. And only by tendering the correct amount can the debtor in the tax bill stop the running of interest on that which is really due. *Neenan v. Smith*, 60 Mo. 292. (5) After proof of the assent of defendant to the change from natural to artificial stone curbing, which was shown by the evidence to be better, and to have cost less than the natural stone, the tax bill became and was "*prima facie* evidence of the validity of the bill, of the doing of the work, and of the furnishing of the materials charged for, and of the liability of the property to the charge stated in the bill." Plaintiff's first instruction tracked the law. 1 R. S., sec. 1407; *Ward v. Green*, 7 Mo. App. 82; *Ess v. Bouton*, 64 Mo. 105. (6) The ordinance for the construction and maintenance of the electric street railway on Francis street, read in evidence by defendant, was a mere license, which the company had a right to abandon at any time. The statute gives a railroad company the right to change its line of road or any part of it, at any time. R. S. 1889, sec. 2559; *People v. Railroad*, 24 N. Y. 263.

Smith, P. J.—This was a suit instituted to enforce the lien of a special tax bill issued by the city of St. Joseph under the powers conferred by the statutes upon cities of the second class, of which it was one. The property-owners on Francis street, among whom was defendant, petitioned the city council to have a part of said street paved with brick. At the time the

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petition was signed and presented, that portion of the street sought to be paved had a street railway track laid down thereon. The city had, by an ordinance, passed in conformity to its charter, section 1270, Revised Statutes, previously granted the street railway company owning said track permission to lay it down in the street. The ordinance required the said street railway company to pave "the space between the rails and for eighteen inches outside of the rails * * * with the same kind of paving with which the streets are now or may hereafter be paved, and by them kept in repair." The street railway company, by consent of the city, had removed its track from the street before the improvement thereof was begun.

Neither in the petition, ordinance, specifications or contract for the improving of said street was there any reference made to said street railway track. The plaintiff had judgment, and the defendant appealed.

I. The defendant's first ground of complaint is that it was the duty of the street railway company to pay for paving the space between its rails, and for eighteen inches on the outside thereof, which it did not do. He insists that the part of said street improvement which was chargeable to said street railway company has been erroneously charged against his property and that of the other abutting owners. We do not think this contention can be sustained. By reference to the statute, sections 1404, 1405, 1406, which is the charter of the city, it will be seen that it is there provided that "the costs of all work on streets, avenues and highways or any part thereof shall be charged as a special tax on lands on both sides of and adjoining the street, avenue or highway or part thereof." There is no statute which authorizes or requires a special tax bill to be made out against the property of a street railway company for any part of the cost of an improvement made in a street

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over which it has laid its track. It is not disputed but that the street railway company not only removed its track from the street, but that it had the lawful right to do so, before the work of improving the street begun. The whole theory of street improvement provided by the statute is that the property benefited thereby must be charged with the cost thereof. It may be, and doubtless is, true, that if the street railway company had continued to occupy a part of the street with its track that it would have been liable for such improvement to the extent of the cost of paving the space between its rails and for eighteen inches outside thereof. As to whom liable, or how such liability should be enforced in such case, we need express no opinion as the question does not arise in the case. It nowhere appears that the street railway company was bound to perpetually maintain its track on said street. Its duty to pave was coextensive with the existence of its street franchise. If its license to occupy the street with its railway track was revoked by the city, the corresponding duty to pave the space required by the ordinance necessarily terminated. How could the railway company or the contractor pave the space between the rails and for eighteen inches on the outside thereof, if there was no such railway track in the street? How could it be benefited in such case by the street improvement? What principle can be invoked to make it liable for any part of that improvement under such circumstances? It must be presumed that the defendant had notice of the provisions of the ordinance granting the street railway company the right to use the street. He must be held to have known when he petitioned the common council to order the improvement of the street that the duty of the railway company to pave did not extend beyond the time when it should cease to maintain its track on the street under the license granted it by the city. The

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defendant petitioned the city to improve the street when he knew that the duty of the street railway company to pave the space required by the ordinance granting it the right to occupy the street with its track was contingent in its nature, and not a continuing one. We cannot discover that the defendant has any just grounds for complaint on this account.

II. The defendant further contends that the trial court should have directed a verdict for the defendant for the reason that the city in making the improvement of the street failed to follow the mode and to use the material prescribed by the general ordinances of the city, in that there was no plan and specifications of the proposed improvement on file in the office of the city engineer when the special ordinance was passed requiring such improvement to be made or at the time the notice was given that bids therefor would be received by the engineer. The evidence conduces to show that, previous to the passage of the ordinance providing for the improvement of Francis street, there was on file in the engineer's office specifications for all street-paving with brick. There was also a plan showing the heights of the curbing along the street, a plan showing the elevation and lines of the curbing along the street, and the condition in which it existed before the work was done on it. It showed the height of the curbing and the width of the street and curbing. There was some evidence tending to show that this plan, with the specifications, was in the engineer's office before the special ordinance was passed or the notice for the bids for doing the work given. This, it seems to us, sufficiently met the requirements of the ordinance for all practical purposes. The specifications called for artificial stone curbing. General ordinance number 158 required that the material for all street curbing should consist of the best quality of lime or sand stone.

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The notice that bids would be received for the work called for natural stone. The bids were accordingly made.

The objection urged is, that the specifications called for artificial stone for the curbing, while the general ordinance, notice and bids called for natural stone. The bidders, who doubtless knew the requirements of the general ordinance, made their bids as if natural stone had been called for in the specifications. We are inclined to think that the plan and specifications were in substantial compliance with the ordinance in every essential particular, except as to the natural stone. We should deem this departure fatal, were it not that the notice and bids were for the kind of stone required by the ordinance, and, besides this, it does not seem to have misled bidders or to have operated prejudicially to the interests of the abutting property-owners in any way. It is to be observed, too, that the infirmity in the case does not arise from a want of power, but from the mode of exercising it. Now, defendant, after the bids had been received, for natural curbing, petitioned the common council to substitute artificial stone in the place of natural stone, which was accordingly done. The contract was let to Gibson, who was the lowest bidder for the work. The council fixed the price of the artificial curbing, so that there was no competition among the bidders as to that item; but as this was brought about by the action of defendant and the other property-owners themselves, they cannot complain of the matter. The defendant not only requested the city council to change the curbing from natural to artificial stone, but he also directed the contractors to remove the old curbing in front of his property, and put in new curbing, which he knew was by the contract to be of artificial stone. He saw the contractor put in the artificial curbing in front of his property, and made

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no objection whatever thereto. It, therefore, appearing that the defendant, with others, having procured the substitution of the contract made for the one contemplated by the ordinance, he is by every principle of right estopped to deny the validity of the assessment. And, even if he had not procured the change in the contract, he would be estopped on the further ground that he had actual knowledge of the change, and acquiesced in the work done under it. These views are supported by the rulings made in *Galbreath v. Newton*, 30 Mo. App. 380, and in *Sheehan v. Owen*, 82 Mo. 464.

II. There is no dispute but that there was a substantial compliance with the contract for doing the work. The mere fact that the contractor caused the work to be performed by another was, we think, of no consequence. It is not pretended that there was a formal assignment of the contract. Gibson entered into bond for the faithful performance of the work. When the work was performed and accepted by the city, the tax bills therefor were issued to him. No one was prejudiced by his action in causing the work to be done by another, Besides this, it may be well questioned whether the property-owners would be permitted to defeat the tax bills where there had been substantial compliance with the contract, and the work accepted by the city, even if there had been an assignment. We do not think the court erred in its action in refusing to tell the jury, if they found there had been an assignment of the contract, there could be no recovery.

The case was fairly tried, and, discovering no error prejudicial to the plaintiff on the merits, we must affirm the judgment. All concur.

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THE STATE OF MISSOURI, Respondent, v. FRED YOCKEY, Appellant.

Kansas City Court of Appeals, April 25, 1892.

Selling Liquor to Minor: EVIDENCE: OTHER OFFENSE. In the prosecution for selling liquor to a minor, the testimony should be confined to the sale to the minor named in the indictment, and when there is no evidence of such sale there can be no conviction.

Appeal from the Vernon Circuit Court.—HON. D. P. STRATTON, Judge.

REVERSED.

J. B. Johnson, for appellant.

The indictment is for selling to one Ed. Miller; as to a sale to such a party there is not one iota of evidence, and sales to other parties will not support this indictment. *State v. Hay*, 36 Mo. 80. But take it for granted the party intended was Ed. Miller, the only evidence in regard to him is this question and answer: "Do you know Ed. Miller? *A.* I don't know that I do." How a conviction can be supported on such evidence we cannot understand. We are not asking the court to review or weigh the evidence, but to say there was no evidence on which to predicate a judgment.

ELLISON, J.—This proceeding appears from the transcript to be based on an information against the defendant for selling "one glass of beer to one ———, a minor under the age of twenty-one years, without the written permission so to do of the parent, master or guardian of said ——— first had and obtained, contrary," etc.

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The abstract of the record presented by counsel shows the case to be based on an *indictment* by the grand jury, in which defendant is charged with selling "one glass of beer to one Ed. Miller, a minor under the age of twenty-one years, without the permission so to do of the parents, master or guardian of said Ed. Miller, first had and obtained, contrary," etc. Defendant was convicted.

There was a motion for new trial and in arrest of judgment. The latter motion contained among other reasons, the following: "That the law under which the indictment herein was drawn is unconstitutional and void, for that it makes the principal criminally liable for the acts of his agent." The case was appealed to the supreme court. That court transferred the cause here, sustaining the motion of the attorney general for its transfer, which set up as the only reason that the case "does not present any question involving the construction of any provision of the constitution of this state or of the United States."

One of the principal points made for reversal is that there is no evidence whatever to sustain the case. We think the point well taken. The testimony does not refer to the minor, Ed. Miller, directly or indirectly. There is some testimony going to show a sale to one *Hubert* Miller, but even he was not proven to be a minor. While the latter was being examined as a witness the following admission was made: "Defendant admits that the liquor, if sold, was so sold without the written permission of the witness' parents or guardian." This admission did not show the witness was a minor. The testimony should be confined to the sale to the minor named in the indictment.

The judgment is reversed and defendant discharged. All concur.

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THE STATE OF MISSOURI, Respondent, v. SAMUEL POLLOCK, Appellant.

Kansas City Court of Appeals, April 25, 1892.

1. **Carrying Concealed Weapons:** EVIDENCE: OFFICER. In defense of a prosecution for carrying concealed weapons, in a court-house during the sitting of court, the defendant may show he had the weapon for the purpose of producing it on the trial of a suit then pending; and also that he was a deputy constable authorized to execute process, warrants, etc., and the rejection of such evidence is error.

2. ——: CONSTABLE OUT OF HIS TOWNSHIP. A deputy constable has powers and duties over his entire county, and his being out of his township will not deprive him of his right to show his official character as defense in a prosecution for carrying concealed weapons.

Appeal from the Holt Circuit Court.—HON. CYRUS A. ANTHONY, Judge.

REVERSED AND REMANDED.

John W. Stoaks and *John Kennish*, for appellant.

(1) The court erred in excluding evidence that defendant was a deputy constable. R. S. 1889, sec. 3503; *Clayton v. State*, 17 S. W. Rep. 261; R. S. 1889, sec. 2380. (2) Instructions, numbered 2 and 3, for the defense should have been given. R. S. 1889, sec. 3503; *Clayton v. State*, 17 S. W. Rep. 261; R. S. 1889, sec. 2380; *Williams v. State*, 42 Tex. 466.

William E. Stubbs, for respondent.

The court very properly instructed the jury as to the law. R. S. 1889, sec. 3502. The court committed no error in refusing to give instruction, numbered 1, asked by the defendant; for the motive of the defendant

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is immaterial unless it amounts to a justification under the statute. 7 Black, 572. The court did not err in excluding evidence that defendant was a deputy constable, for the defendant's own testimony showed he was not carrying the pistol in the capacity of an officer. The court did not err in refusing to give instruction, numbered 2, asked by the defendant, for the right of an officer to bear firearms is limited to carrying them in the proper and necessary discharge of his official duties. *State v. Wisdom*, 84 Mo. 177.

Ellison, J.—On the twenty-ninth day of April, 1891, at the April term of the Holt circuit court, the defendant was tried by a jury, and convicted on an information, under section 3502 of Revised Statutes, 1889, charging him with the offense of going into a court-room in Holt county, during the sitting of court, having upon and about his person a deadly weapon, to-wit, a revolving pistol.

On the trial, after the state had introduced evidence tending to prove the issues on its part, the defendant in his defense offered to introduce evidence tending to prove that, at the time and place he was charged with carrying the pistol, he was a defendant in a criminal prosecution then on trial, in which he was charged with using the pistol, and that he carried it into the court-room at that time believing that he would be required to produce it in evidence, and *for no other purpose*. Defendant also offered to introduce evidence tending to prove that at the time and place mentioned in the information he was a deputy constable of Benton township, in Holt county, and that as such officer he was authorized to execute process and warrants, and to make arrests anywhere in said county.

These offers were rejected. Instructions placing such hypotheses to the jury were refused. We must

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hold the rulings of the trial court to be error under the decisions of the St. Louis Court of Appeals in *State v. Larkin*, 24 Mo. App. 410, and *State v. Roberts*, 39 Mo. App. 47.

It was stated at the argument that the exclusion of evidence showing defendant's official character was on the ground that he was not in the township of which he was constable. This is not a sufficient objection. He was in the county in which his township was located, and as such officer he had powers and duties over the entire county. R. S. 1889, sec. 2380. It has been held in *Clayton v. State*, 21 Tex. App.; s. c., 19 S. W. Rep. 261, that a deputy sheriff would not be amenable to a similar statute to ours for carrying weapons in another county, even though he be there on private business. And in *Williams v. State*, 42 Tex. 466, under a statute which declared that, "If any person shall go into any church * * * and shall have or carry about his person any pistol * * * unless an officer of the peace, he shall be guilty of a misdemeanor," etc.; it was held that the defense was made out by showing that the accused was such officer without showing that he was at the time and place engaged in the discharge of his duties as such officer.

The judgment will be reversed and the cause remanded. All concur.

SETH E. WARD, Respondent, v. JOHN H. KRULL *et al.*, Appellants. 49 447 / 69 207

Kansas City Court of Appeals, April 25, 1892.

Landlord and Tenant: HOLDING TENANT AND RECEIVING RENT FROM SUBTENANT. Mere knowledge on the part of the lessor of the occupancy of another, and acceptance of rent from the occupant, does not show that the lessor has discharged the original lessee from his covenant to pay for the whole term.

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Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

AFFIRMED.

Teasdale, Ingraham & Cowherd, for appellants.

The position of the defendants is that when they delivered possession of the premises described in the lease to the Krull Tailoring Company, a corporation, and the plaintiff, knowing of, and consenting to, such change of possession, accepted rent from the Krull Tailoring Company as his tenant, then the defendants were discharged under the case, or, in other words, this state of facts constituted a surrender of the lease. To sustain this position, we refer to the following cases: *Koering v. Brewing Co.*, 38 Mo. App. 182, 186; *Hutchison v. Jones*, 79 Mo. 496; *Prior v. Kiso*, 81 Mo. 248; *Mathews v. Tobener*, 39 Mo. 115; *Kerr v. Clark*, 19 Mo. 132; *Clemmons v. Bromfield*, 19 Mo. 118; *Randall v. Rich*, 11 Mass. 493; *Colton v. Gorham*, 33 N. W. Rep. 76; *Smith v. Niver*, 2 Barb. 180; *Knisey v. Minick*, 43 Me. 121.

Hugh C. Ward, for respondent.

The law governing this case has been settled for years and years, and the decisions in this country and England are uniform and in perfect harmony. The cases of *Whetstone v. McCartney*, 32 Mo. App. 430, and *Jones v. Barnes*, 45 Mo. App. 590, are decisive of this case.

ELLISON, J.—Defendant rented of plaintiff, for a term of five years, by written lease, a certain business building in Kansas City. The lease contained a covenant by defendant to pay plaintiff the rent for the

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whole term. Shortly after the lease was executed, defendant turned the property over to a corporation organized by himself and others and which carried on the same business in which defendant was engaged. The testimony, while not showing an assignment of the lease by defendant to the corporation, does not show that plaintiff knew that the corporation was occupying the premises, and that plaintiff for several months accepted monthly payments of rent from the corporation. It also shows that upon the corporation becoming insolvent, and its stock being taken possession of by a creditor under a chattel mortgage, plaintiff received the payment of one month's rent from such creditor.

This is all that was shown, and the trial court properly directed a verdict for plaintiff. Mere knowledge on the part of the lessor of the occupancy of another, and acceptance of rent from the occupant, does not show that the lessor has discharged the original lessee from his covenant to pay for the whole term. See cases of *Jones v. Barnes*, 45 Mo. App. 590, and *Whetstone v. McCartney*, 32 Mo. App. 430. Defendant concedes the law in these cases, but contends that a lessor may discharge the lessee from his obligation and accept a new tenant in his stead. We do not doubt this; but the difficulty is, that in this case there is no evidence upon which to base such contention. A lessor's knowledge of the assignment of a lease and acceptance of rent from the sublessee, not being at all inconsistent with holding the original lessee to his express covenant, for the remaining unpaid rent during the term, cannot alone have the effect of discharging such original lessee. *Jones v. Barnes*, *supra*, and authorities cited therein.

The judgment must be affirmed. All concur.

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J. G. WHITE *et al.*, Respondents; W. H. STAHL *et al.*, Intervenors and Appellants, v. THE UNIVERSITY LAND COMPANY *et al.*, Appellants.

Kansas City Court of Appeals, April 25, 1892.

1. **Mortgage:** CONDITIONAL SALE: SURPLUS OF PROCEEDS OF SALE. A land company by its articles of association provided for the purchase of a tract of land and directed its director on the receipt of the charter to convey the north twenty acres of the tract to a university. Before this conveyance the university ordered the land company to mortgage the twenty acres for its benefit, agreeing that, if it did not pay the mortgage debt when due, it thereby forfeited its right to the conveyance of said twenty acres. Default was made in the payment of the debt, and sale followed. *Held*, the agreement between the land company and university was a mortgage, and not a conditional sale, and the surplus of the mortgage sale belongs to the university and went to its creditors.

2. ———: ———: ———: RULE OF CONSTRUCTION. If the debt for which the conveyance was made still remains, then the transaction is to be considered as a mortgage rather than a conditional sale, and while the intention should control, if this is in doubt, the conveyance will be held a mortgage rather than a conditional sale.

3. **Creditors' Bill:** ADJUDICATED DEMAND: TRUST FUND. Where a creditor seeks to set aside a fraudulent conveyance of his debtor, he must come into a court of equity with an adjudicated demand, but a bill may be maintained to have a court of equity take charge of the assets of an insolvent and dissolved corporation and distribute it ratably among its creditors without the creditors putting their claim in judgment, such assets being a trust fund for the benefit of all the creditors alike.

4. ———: DISTRIBUTING TRUST FUNDS. A trust fund like the assets of an insolvent corporation, after payment of the legitimate costs and expenses, should be distributed among the creditors *pro rata*.

5. ———: EXPENSES OF PRESERVING TRUST FUND. Where the original plaintiffs have borne all, or the major portion, of the expense incurred in employing counsel and preparing the cause for trial, it would seem just and equitable that such extra expenses be first paid before any distribution is ordered.

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Appeal from the Pettis Circuit Court.—Hon. Richard Field, Judge.

Affirmed (*in part*); reversed and remanded (*in part*).

Wm. S. Shirk and *B. G. Wilkerson*, for appellants.

(1) Plaintiffs had not, prior to the institution of this suit, reduced their claims to judgment. There existed no reason why they could not or should not have done so. They cannot, therefore, maintain this action. *Luthey v. Woods*, 1 Mo. App. 167; *Dodd, Brown & Co. v. Levy*, 10 Mo. App. 121; *Batchelder v. Altheimer*, 10 Mo. App. 189; *Thias v. Steiner*, 102 Mo. 314; *Kent v. Curtis*, 4 Mo. App. 121; *Merry v. Freeman*, 44 Mo. 518; *Roan v. Winn*, 93 Mo. 512; *Humphreys v. Milling Co.*, 95 Mo. 542. The cases of *Turner v. Adams*, 46 Mo. 85; *Pendleton v. Perkins*, 49 Mo. 565, are exceptions to the rule, made so by the peculiar facts surrounding those cases. Nevertheless, they recognize to its full extent the rule we contend for. (2) The circuit court erred in holding that the contract of June 28, 1884, was merely a mortgage of its property by the Sedalia University Company to the University Land Company. Such was not the intention of the parties to said contract, and, in the absence of fraud, oppression or mistake, parties may make, and the law will enforce, any contract not made in violation of law, good morals or public policy. The intention of the parties will be carried out and not frustrated, by the court making a new contract for them. *Brandt v. Robertson*, 16 Mo. 129; *Turner v. Kerr*, 44 Mo. 429; *Slowey v. McMurray*, 27 Mo. 113; *Worley v. Dryden*, 57 Mo. 226; *Cornell v. Hall*, 22 Mich. 377; *Conway v. Alexander*, 7 Cranch, 218; *Smith v. Crosby*, 47 Wis.

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160. (3) Defendant's equity, to this surplus, is superior to that of the university company, or plaintiffs as its creditors. The land company paid for the twenty acres of land in the first instance (except $8) out of funds raised by it, entirely outside of this twenty acres; it paid for every dollar's worth of improvements, by money borrowed by it partly upon its own land, outside of this twenty acres; it pledged its other property to increase the value of this, and to aid the university company, and it should stand superior to the rights of all others, after the university company abandoned the university enterprise, and in effect said: "We have abandoned all effort to pay the money you borrowed for us. Here is the land, make it out of it if you can. If you cannot, your other property will be sold to pay it."

Jackson & Montgomery, for respondents.

(1) Plaintiffs are seeking to charge the assets of an insolvent and dissolved corporation with the payment of a debt, and were not required to reduce the demand to judgment before bringing its bill, but had a right to commence in a court of equity in the first instance. *First.* Because the funds sought to be reached are trust funds, which are accessible only by the aid of a court of chancery. Wait on Insolvent Corporations, sec. 41, p. 52; Morawetz on Corporations, sec. 1035; *Smith v. Life Ass'n*, 3 Tenn. Ch. 502; *Bank v. Douglas*, 7 Wall. 392; *Railroad v. Ham*, 114 U. S. 504; Story's Equity, 452; *Sanger v. Upton*, 91 U. S. 60; *Railroad v. Howard*, 7 Wall. 410; *Powell v. Railroad*, 42 Mo. 68; *Eppright v. Nickerson*, 78 Mo. 490; *Herman v. Brittan*, 88 Mo. 555; *Batchelder v. Altheimer*, 10 Mo. App. 184. *Second.* In such case the general creditor is not required to reduce his demand to judgment. *Forster v. Mfg. Co.*, 16 Mo. App. 158; s. c.,

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92 Mo. 90; *Batchelder v. Altheimer*, 10 Mo. App. 184; *Mills Co. v. Kampe*, 38 Mo. App. 234; *Williams v. Jones*, 23 Mo. App. 132; *Merry v. Freeman*, 44 Mo. 518; *Pendleton v. Perkins*, 49 Mo. 567; *Hill v. Fogg*, 41 Mo. 569; *Russell v. Clark's Ex'r*, 7 Cranch, 87; *Miller v. Davidson*, 8 Ill. 518; *O'Brien v. Coulter*, 2 Black. 421; *Trustees v. Merrill*, 3 Johns. 98; *Case v. Beauregard*, 101 U. S. 690; *State ex rel. v. Brockman*, 39 Mo. App. 137. (2) The debtor, being wholly insolvent, and the proceeding at law a useless and meaningless ceremony, because wholly unavailing, the creditor is not required to reduce the demand to judgment before proceeding in equity. *Bank v. Kellogg*, 52 Mo. 582; *Shickle v. Watts*, 94 Mo. 420; *Crim v. Walker*, 79 Mo. 335; *Perry v. Turner*, 55 Mo. 423; *Heralson v. Mason*, 53 Mo. 212; *Walker v. Dever*, 79 Mo. 674; *Luthey v. Woods*, 1 Mo. App. 167; *Luthey v. Woods*, 6 Mo. App. 67; *Kent v. Curtis*, 4 Mo. App. 121–131; *Nicters v. Brockman*, 11 Mo. App. 600; *Lackland v. Smith*, 5 Mo. App. 161; *Furlong v. Thomsen*, 19 Mo. App. 367; *Beal v. McVickers*, 3 Mo. App. 592; *Dryden v. Kellogg*, 2 Mo. App. 95. (3) The contract of June 24, 1884, is in effect a mortgage and created the relation of mortgagee and mortgagor between the parties thereto. Jones on Mortgages, secs. 251–8, 263–9, 272–9; *O'Neal v. Capelle*, 62 Mo. 206; *Brant v. Robeson*, 16 Mo. 143; *Worley v. Dryden*, 57 Mo. 228; *Wilson v. Drumrite*, 21 Mo. 329; *Turner v. Kerr*, 44 Mo. 432; *Slowey v. McMurray*, 27 Mo. 113. (4) The court will reward the diligent, and when equities are equal the first in order should prevail. Pomeroy's Equity, sec. 414. The plaintiffs having discovered the assets and filed their bill will be given priority over an intervenor who comes in only when the case is ready for trial in all cases where the assets are not legal and a resort must be had to a court of equity. *Pullis v. Robertson*, 5 Mo.

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App. 548; s. c., 73 Mo. 201; *Rozelle v. Harmon*, 29 Mo. App. 569; s. c., 103 Mo. 339; *George v. Williamson*, 26 Mo. 193; *Harris v. Harris*, 25 Mo. App. 496; *Jackman v. Robertson*, 64 Mo. 289; *Lucas v. Atwood*, 2 Stew. 378; *Osgood v. Bank*, 30 Conn. 27; *Gordon v. Lowell*, 21 Me. 251; *McDermot v. Strong*, 4 Johns. Ch. 687; *Corning v. White*, 2 Paige, 567. (5) If the court hold the contrary, then plaintiffs are entitled first to be reimbursed out of funds recovered by the judgment the expenses incurred by them in preparing the action for trial, and their attorneys' fees. 2 Daniels' Chancery Practice, 1213, 1424; *Williams v. Morgan*, 111 U. S. 640; *Myer v. Fenn*, 5 Wall. 205; *Trustees v. Greenough*, 15 Otto, 527; *Williams v. Morgan*, 111 U. S. 699; *Railroad v. Pettus*, 113 U. S. 122–126; *Feshemier v. Baum*, 43 Fed. Rep. 730; *Eastburn & Downes v. Kirk*, 2 Johns. Ch. 317; *Downing v. Marshall*, 37 N. Y. 380; *Railroad v. Wilson*, 11 U. S. 406.

E. J. Smith, for Stahl & Ready.

(1) Plaintiffs White, Smith & Wood were corporators of the Sedalia University, the dissolved corporation. They were all the while in its managing board of trustees, Smith nearly all the time president, and White secretary of it, they being the last such officers. In that way they got their information, on which they brought this suit. It was their duty also as such trustees to bring suit in behalf of all creditors of said university. They were, therefore, not entitled to any preference over the other creditors of said Sedalia University. R. S. 1889, sec. 2513; *Williams v. Jones*, 23 Mo. App. 132, and cases cited; *Mill Co. v. Kampe*, 38 Mo. App. 229; *State ex rel. v. Brockman*, 39 Mo. App. 131; *Roan v. Winn*, 93 Mo. 503; 1 Story's Equity [2 Ed.] secs. 546–549; *Colby v. Capp*, 35 N. H. 434;

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Richards v. Ins. Co., 43 N. H. 263; *Downey v. Cross*, 7 Wall. 299; 2 Perry on Trusts, sec. 596; *Marr v. Bank*, 4 Cold. 471. (2) Besides, such allowance is like and in the nature of costs, which is always in the discretion of the court, and there is neither law nor practice in this state providing for such as here claimed, and costs must come strictly within the law or they cannot be allowed. So a judgment will not be reversed, because such claim was not allowed. *Walton v. Walton*, 19 Mo. 667; *Shed v. Railroad*, 67 Mo. 687; *In re Murphy*, 22 Mo. App. 476; *Downs v. Kirk*, 2 Johns. Ch. 317; *Downing v. Marshall*, 37 N. Y. 380; R. S. 1889, sec. 2513. (3) It will be seen that nearly all the cases relied on by plaintiffs are cases of simple trustees, acting not for their own benefit, but solely for that of others. To this, *Trustees v. Greenough*, 105 U. S. 527, may be said to be an exception; but that was a case where the trustees proper refused to act and were squandering the fund, and had to be made defendants. *Railroad v. Pettus*, 115 U. S. 116, also was not a case of a trustee proper, but it was all that we said as to last above with the addition that in it there was an understanding between the plaintiffs who filed the bill and their attorneys, that the attorneys should have pay from others who might prove up under the decree.

Gill, J.—The facts of this case as disclosed by the evidence are as follows:

In the year 1882, some of the citizens of Sedalia undertook to establish a school of a somewhat higher standard than the common schools, and for this purpose contemporaneously organized two corporations, one called "The Sedalia University," whose articles of association were acknowledged October 3, 1882, and the other was called "The University Land Company," whose articles were acknowledged October 28, 1882.

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The former was organized under the statute relating to the organization of benevolent associations, and the other under the chapter relating to manufacturing and business companies, with a capital stock of $10,000. The promoters of both corporations were in the main the same. The articles of association of the land company contain the following provisions, viz.:

"Sec. 6. The purposes for which this corporation is named is to purchase real estate in and adjoining the city of Sedalia, and to improve, cultivate, sell and dispose of the same. One special object of forming this corporation is to buy a certain tract of land lying south of and adjoining said city of Sedalia, containing about fifty-four acres, and known as the Elisha Barrett farm, and to donate, or sell for a nominal sum, twenty acres thereof, including the improvements to the Sedalia University. And the board of directors are hereby authorized and directed, when these articles of association are complete and filed with the secretary of state, to make and execute the deed of this corporation to said Sedalia University to said twenty acres of land."

The object of organizing the university company was to "found, maintain and establish" a university in the city of Sedalia; and to receive from the land company the north twenty acres of land, which contained the improvements.

The fifty-four acres were bought of Barrett for $10,000, one-half of which was paid in cash, and a note bearing interest executed for the remaining $5,000, secured by a deed of trust on the whole tract. The university company took possession at once of the said north twenty acres, and held it, without question, until June, 1887, and conducted there a school such as the promoters contemplated. The land company in like manner occupies the remaining thirty-four acres, and have held it ever since; never at any time claiming the

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right to the twenty acres until in 1888. The land company, until in 1888, always recognized the university company as the owner of the north twenty acres, and on March 23, 1883, appointed a committee of its board to survey and locate the same. The whole of the capital stock of the land company was subscribed, and all paid in except $840; but this deficit left the company this much behind in funds to pay the balance of the debt to Barrett, and the accumulated interest and costs.

The school was opened and conducted, but with continued financial embarrassment, until June, 1884, when the university company needed additional rooms and buildings, and was in sad need of the money to pay for them. Under these circumstances they applied to the land company, who still held the title to the whole fifty-four-acre tract, to borrow upon it the needed funds. They did this, and the contract of June 28, 1884, set out in the plaintiff's petition, was entered into between the land company and the university company. By this contract it was agreed that the land company had, at the request of the university company, borrowed $5,000 of the Missouri Trust Company, for which the land company has executed its note, and secured the same upon the whole fifty-four acres. The net proceeds of the loan were to be used in paying Barrett $878.55, the balance due on the original purchase money of the land, and the balance to be turned over to the university company, to be by them expended in improvement on the said north twenty acres. The university company bound itself to pay the principal and interest of said indebtedness as it matured; and upon such payment being completed was to receive a deed from the land company for the twenty acres, in pursuance of the articles of association of the land company, and the land company should also repay it the said sum of $878.55; but, in

case of default on the part of the university company, then it waived and forfeited all the right to any conveyance or said land from the land company. The money was disbursed, in accordance with the contract; Barrett was paid, and the net proceeds of the loan ($3,800) paid the university company, and expended in improvements on the said north twenty acres.

A difference of opinion existed between the land company and the university company, or arose at this time and was finally settled by the contract as the witnesses state; they could do nothing else. The land company held the title and would not convey it or mortgage it except upon the terms of that contract. The university company had already contracted on the faith of getting the money for an expenditure of $5,000, and they had to borrow the $1,200. The plaintiffs went on the note, and afterwards had it to pay, and this is the demand upon which the action is brought. There is no controversy as to the debt or its amount. The university company carried on the school, paid the interest on the note until June, 1887. Default having then been made, the land company paid interest amounting to $300. The land was again advertised, and plaintiffs bought the note from the Missouri Trust Company, the holder of the note, and again stopped the sale.

On February 2, 1888, the land company declared the land forfeited under the contract of June 28, 1884, and directed Mr. Wilkerson, their president, to take possession of the same. Mr. White had been left in charge of it by the university company, and Mr. Wilkerson got Mr. White to deliver possession to him. Mr. White did so without any direction or authority of the board of trustees of the university company, and without calling any meeting to consider the matter. The school had closed, and no meetings of the board

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had been held for several months. From this time on until the foreclosure, Mr. Wilkerson, as the president of the land company, kept possession of the entire premises and collected the rents.

Default still continuing on the payment of the indebtedness represented by the $5,000 mortgage, the holder advertised the same for sale, and the sale was had on the sixth day of March, 1889. This deed of trust, it must be borne in mind, was executed by the land company, and conveyed the whole fifty-four acres to P. H. Sangree, and contained the usual clause, that the proceeds of the sale, after paying the debt, etc., should be paid to the land company, and was claimed from the trustee by the land company. When the trustee was about to offer the land for sale, Mr. Wilkerson, as the president and representative of the land company, requested that the north twenty acres being that part of the tract of fifty-four claimed by the university company be sold first, and it was so offered by the trustee and brought $6,900, which, after paying the debt and costs, left a balance in the hands of the trustee of $866.58. An account was taken by the court and judgment rendered against the defendants. No question was raised, nor is here made, as to the fairness or correctness of the accounting, but the whole question is as to the right of the plaintiffs to recover at all. The court gave judgment against the defendant for the $878.55, after deducting therefrom such amount as the accounting showed to be proper, and for $935, the proceeds of the sale under the deed of trust, after paying the debt, cost, etc., in the hands of the defendant Sangree, which amounts were to be divided *pro rata* between plaintiffs and intervenors. The plaintiff's claim, in the aggregate, was $688.50, and intervenors', $6,224.65.

This is a sufficient statement for the consideration

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of the main controversy, to-wit: Whether or not these original and intervening plaintiffs have any equitable right to the funds in dispute. There is, however, another branch to this suit, and that is as to the relative rights, between plaintiffs (original and intervening) in the distribution of the money. The lower court held they were entitled in the proportion of the amounts of their respective claims, but the original plaintiffs (who begun the suit) claim some priority and appealed from the order of the circuit court on distribution. But of this later on.

I. The facts of this case are more complicated than are the questions of law involved. Indeed, the latter are few, and not very difficult of satisfactory solution. It will be observed that this is a creditor's bill, whereby the plaintiffs, holding claims against the defunct corporation known as the Sedalia University, "seek to reach and appropriate to the payment of said claims certain alleged assets of the debtor corporation." I think the facts may be somewhat simplified by eliminating much that is contained in the foregoing statement and presenting the substance in this manner: In June, 1884, the university corporation was the equitable owner of the twenty acres of land in the vicinity of Sedalia, and desired to borrow thereon the sum of $5,000; and for this purpose applied to the land company (in whom was the legal title of the land) to make a deed of trust to secure the amount said university company desired to borrow. The land company still owed a balance of purchase money on the entire fifty-four acres of $878.55, which it was insisted should be paid out of the proceeds thus to be borrowed by the university company. To this the latter company objected. However, after much negotiation, an agreement was arrived at, and the following contract was executed:

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"The University Land Company and the Sedalia University on this the twenty-eighth day of June, 1884, made the following contract and agreement: At the request of said university, said land company has borrowed from the Missouri Trust Company $5,000, and said land company has executed to said Missouri Trust Company its note for said sum of $5,000, even date herewith, payable to the order of the said Missouri Trust Company, five years after date with interest from date until paid, at the rate of six and one-half per cent. per annum, said interest is payable semi-annually and is evidenced by ten interest coupons for $162.50 each, attached to said note, said coupon and note by their express terms are to bear interest after their maturity until paid at the rate of ten per cent. per annum. The net proceeds of said note remaining after paying the costs and expenses of said loan to be applied as follows: First to the payments of amounts $878.55 on the note given by said land company to one J. R. Barrett, for a part of the purchase money of a certain tract of land in section 9, township 45, and range 21, in Pettis county, Missouri, containing fifty-four acres, which said Barrett in the year 1882 sold and conveyed to said land company, and the balance of said proceeds shall be paid over to said university to be used by it, in the erection of improvements on said tract of land. To secure the payment of said note and coupons said land company has this day executed to one P. H. Sangree, trustee, a deed of trust on said tract of land. Said university agrees to pay the interest on the said notes semi-annually as it accrues, and becomes due, and according to the terms of said notes and coupons, and to pay said sum of $5,000 when it becomes due, and to pay all interest that may accrue on any of said coupons, or on said note after the maturity thereof, and said university agrees to pay for all insurance and the

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buildings on said tract of land by said deed of trust, and also, to pay all taxes on the north twenty acres of said tract of land during the continuance of said loan, and the university shall have the use of the north twenty acres of said fifty-four-acre tract of land for five years, provided it pays said interest, taxes and insurance agreeable to this contract, and if the said university shall pay said interest and taxes and pay the said insurance and pay said principal sum of $5,000, when the same becomes due, then the said land company shall convey to said university company in pursuance of the articles of association of said land company twenty acres off the north end of said fifty-four-acre tract, and said land company shall also pay to the said university company said sum of $878.55. But if said university company shall fail or neglect to pay two successive installments of said interest on said note as evidenced by said coupons, or if it shall fail or neglect to pay said taxes or said insurance, or if it shall fail or neglect to pay said principal sum of $5,000 at maturity of said note, then said university waives and forfeits all right to have said twenty acres of land conveyed to it, as provided in the articles of association of said land company.

"In witness whereof, the president and secretary of the board of trustees of said university, by order of the said board, have hereunto signed their names and affixed the seal of said university, and the president of said land company and the secretary thereof, by order of the board of directors, have hereunto signed their names, and affixed the seal of said company, the day and year first aforesaid."

The gist of the matter, then, is that the university company borrowed this $5,000 pledging its land to pay the same, but let the land company have the sum of $878.55, coupled with a promise of the land company

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to return the same. Thus far, then, this clearly was nothing more nor less than an equitable mortgage by the university company of its twenty acres of land. But a further provision occurs in this contract, to-wit: That if the university company failed to pay the debt thus contracted with all interest, etc., as it matures, it is then stipulated that it shall forfeit all right in said land to the land company. The university company did fail to pay, the land was sold under the deed of trust, and it remains to be determined as to who is entitled to the surplus held by the trustee.

The trial court held under this state of facts that the contract between the two corporations was a mortgage, and that as between the university and the land company the surplus arising from the sale by the trustee belonged to said university company; and we are of the same opinion. As already stated in equity the university corporation was at the date of the contract of June, 1884, the owner of the twenty acres of land. By the very terms of its corporate charter the land company was bound absolutely to convey this twenty acres to the university. We quote from its articles of association: "One special object of forming this corporation is to buy a certain tract of land lying south of and adjoining said city of Sedalia, containing about fifty-four acres and known as the Elisha Barrett farm, and *to donate or sell for a nominal sum twenty acres thereof,* including the improvements to the Sedalia University. And the board of directors are hereby *authorized and directed,* when these articles of association are completed and filed with the secretary of state, to make and execute the deed of this corporation to said Sedalia university to said twenty acres of land."

Since, then, what ought to be done will in equity be considered as done, we now regard the university company as having been invested with the title to this

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land—free and clear, too, of all or any claim by the land company. And when the land company, at the request of the university company, made this deed of trust on the twenty acres to secure the money borrowed by the owner thereof, it was in nowise different than if the legal title had been lodged in the university, and it had by its own act executed the deed of trust. Stripped then of all irrelevant matter, the university company directed its agent or trustee to borrow money on its own land; and the debt thus secured being paid, the surplus, after sale by the trustee in the deed of trust, belonged, as did the land, to the same company. That the university stipulated in its contract with the land company, that in case of its default in paying said secured debt, etc., "then said university waives and forfeits all right to have said twenty acres conveyed to it, as provided in the articles of association of said land company," does not affect the transaction. It was still in the nature of a mortgage, and the right of redemption still remained. "The mortgagor is not allowed thus to renounce beforehand his privilege of redemption." 1 Jones on Mortgages [4 Ed.] sec. 251; *Wilson v. Drumrite*, 21 Mo. 325.

It seems to be the contention of defendant's counsel, that this arrangement between these twin corporations, as evidenced by the writing executed in June, 1884, was in the nature of a *conditional sale*, and not a mortgage. The position is untenable. It will not bear the uniform tests in such cases. It seems settled law, that notwithstanding the absolute form of the conveyance, if the debt for which the same was made still remains, then the transaction is to be considered a mortgage rather than a conditional sale. *Slowey v. McMurray*, 27 Mo. 113; *Turner v. Kerr*, 44 Mo. 429.

The intention of the parties should control, and if this is in doubt it will be held a mortgage rather than a

conditional sale, as it would be more just and equitable. *Brant v. Robertson*, 16 Mo. 129. Measured then by these well-established rules, the agreement of June, 1884, was in the name of a mortgage. There was all the time, at and subsequent to said agreement, a binding obligation on the university to pay the debt; and if the land company had paid off the incumbrance when it matured, or paid the interest, taxes and the like, it would have had recourse on the university. We conclude, therefore, that, as between the university and the land company, the surplus in the hands of Sangree, the trustee, remaining after paying the mortgage debt, belonged to the former; and as a necessary consequence, too, that the land company was indebted to the university company for the return to it of the $878.55 paid to Barrett out of the proceeds of said $5,000 loan.

II. It is claimed, however, that plaintiffs are not entitled to maintain this suit in equity for the reason that their claims had not been reduced to judgment. There is no doubt as to the general proposition that, where a creditor seeks to set aside the alleged fraudulent conveyance of his debtor, he must come into a court of equity with an *adjudicated demand.* He has no right to question the act of his alleged debtor, unless he is shown to be a genuine, *bona fide* creditor; and, as a general rule, it is held that this must first be established by the judgment of a court of law. But this rule even has many exceptions. While admitting it to be necessary that a party shall first exhaust every legal remedy before resorting to the court of equity, yet the courts have, in a great variety of cases, permitted the creditor to apply in the first instance to the court of chancery, as, for example, where it appears manifest that a suit at law would be wholly unavailing.

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Luthey v. Woods, 1 Mo. App. 168, and cases cited. But the case at bar is one of quite a different nature from those applying the rule above stated. This is a suit belonging peculiarly to the jurisdiction of equity. The prime object sought by this bill is to have the court take charge of the assets of an insolvent and dissolved corporation, and distribute it ratably among its creditors. The suit was brought by certain named creditors not only in their own behalf, but as well for all other creditors who might see proper to come into the litigation. And others did come in, and were made parties to the suit. These assets of the insolvent corporation had become trust funds for the benefit of all creditors alike, and, in the absence of the managing head of the corporation itself, and in the presence of a threatened wrongful diversion, a court of equity was asked to lay hold of these funds and apply them to the subjects entitled. A court of equity, in cases of this nature, will take hold of the assets of the defunct corporation, and will settle the respective rights of all claimants, and distribute the same according to equity and good conscience, regardless, too, as to whether the claim may have been reduced to judgment or not. *Kankakee Woolen Mills Co. v. Kampe*, 38 Mo. App. 229, and cases cited; *State ex rel. Noll v. Brockman*, 39 Mo. App. 137; *Foster v. Mill Co.*, 92 Mo. 90.

As we view this controversy, then these plaintiffs (original and intervening) had a superior right to the funds in controversy as against the land company, and, therefore, in that regard, we affirm the judgment of the lower court.

III. This trust fund having been secured, some controversy arose between the original plaintiffs and those subsequently coming in as to the distribution thereof. It will be remembered that the original petition was filed by plaintiffs, White, Smith and Wood, in

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March, 1889. Subsequently an amended petition was filed, wherein the plaintiffs set out that they sued "for themselves and such other creditors of the university company as may appear and unite with them in the prosecution of this cause." In May, 1890, creditors Stahl and Ready, by permission of the court, came in and joined as coplaintiffs. The claim of White and Smith and Wood (the original plaintiffs) amounted to $688.50, while that of the intervening plaintiffs aggregated $6,224.65. As to the amount of these claims, there is no dispute. But the original plaintiffs moved the court, in distributing the amount recovered (which was about $1,700), to order their claim paid in full out of the fund, and the remainder to go to the intervenors. This the court refused, but ordered the fund to be paid out to the different creditors in proportion to the amounts of their respective claims.

Afterwards, to-wit, on the same day, the plaintiffs made application moving the court to make an allowance out of the amounts for which judgment was rendered in this case for plaintiffs as attorneys' fees, for the prosecution of this cause, and for the other expenses incurred by said plaintiffs in procuring evidence and preparing for trial.

And upon the same day the application coming on to be heard, the plaintiffs offered to introduce evidence tending to show the rendition of the services of the attorneys for the plaintiffs, in the prosecution and trial of said cause, and the value thereof and of the expenses incurred by the plaintiffs in the preparation of said case for trial, and that the cause was wholly prepared and tried upon its merits by the attorneys employed by the original plaintiffs, which testimony the court refused to admit, and to this action of the court, in refusing to admit said testimony, the plaintiffs then and there excepted at the time. The court overruled the same

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and refused to make the plaintiffs any allowance as attorneys' fees or for expenses as aforesaid, and to the action of the court, in refusing to enter said allowance, the plaintiffs then and there excepted.

IV. Clearly these original plaintiffs were not entitled to any preference over the other plaintiffs in the distribution of this fund. While it is true they were the original movers in the effort to save these assets of the debtor corporation, yet such suit was brought for and in behalf of the intervening plaintiffs. Stahl and Ready were invited to come into the litigation and to share its success or defeat. They did enter the controversy, and were made coplaintiffs. By the suit the fund was saved, and it composes, under the well-settled doctrine, a trust fund for the benefit of *all* these creditors of the insolvent corporation. After the payment of the legitimate costs and expenses the funds should be distributed among these creditors *pro rata*. *Kankakee Woolen Mills Co. v. Kampe*, 38 Mo. App. 229, and numerous other authorities that might be cited.

V. If, however, these original plaintiffs have borne all, or the major portion, of the expenses incurred in employing counsel and preparing the cause for trial it would seem just and equitable that such extra expense be first paid before any distribution is ordered. But the court below seems to have taken a different view, since the offer of the plaintiffs to show the rendition of the services of their attorneys in the preparation, prosecution and trial of said cause, and the value thereof, as well as other expenses incurred by the plaintiffs in the preparation of the cause for trial, and that said attorneys did the entire work in said cause was denied, and the court refused to make any allowance whatever therefor.

In this ruling we think the court erred. Here was a fund belonging in common to these plaintiffs and intervenors; and, if the truth be, as plaintiffs offered to

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prove, that by their efforts and at their expense the fund was saved for the benefit of all alike, then every sense of justice would suggest that plaintiffs and intervenors alike bear each their portion of such expenses. We are furnished a decision from the United States supreme court quite in point. *Trustees v. Greenough*, 105 U. S. 527. That was a case instituted by the holder of certain railroad bonds, on behalf of himself and others similarly situated, to save from waste and spoliation certain property in which all the bondholders had a common interest. In the prosecution of the suit the plaintiff was necessarily put to large expense for attorneys' fees and the like. He was successful, and the fund was brought into court for distribution. The plaintiff asked, and the circuit court granted, the payment out of the common fund of these attorneys' fees and expenses necessarily incurred for the common benefit. The supreme court sustained the lower court, and in the opinion used this language: "It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority that where one of many parties having a common interest in a trust fund, at his own expense, takes proper proceeding to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement either out of the fund itself or by proportional contribution from those who accepted the benefit of his efforts. The same rule is applied to creditors' suits where a fund has been released by the diligence of the plaintiff." The same court in at least one subsequent opinion indorsed the foregoing rule. *Central Ry. Co. v. Peters*, 113 U. S. 122. For a very full and able discussion of the question involved, we refer to the opinion by Mr. Justice BRADLEY in the *Greenough case*, 105 U. S. 527.

It follows then from the foregoing considerations

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that we affirm the judgment as against the defendants, but must reverse the judgment, and remand the cause so that the court may permit the original plaintiffs to show, and that the court may allow, such reasonable attorneys' fees and other expenses which said plaintiff may have incurred in the institution and prosecution of the cause. All concur.

SAMUEL SCHROEDER, Respondent, v. JOHN V. FAIRES, Appellant.

Kansas City Court of Appeals, April 25, 1892.

Agistment: LIABILITY FOR VICIOUS ANIMAL. Where an agister has knowledge of the vicious character of a horse in his pasture, he will be liable for injuries such horse may inflict on other animals taken for pasture.

Appeal from the Boone Circuit Court.—HON. JOHN A. HOCKADAY, Judge.

AFFIRMED.

C. B. Sebastian, for appellant.

The demurrer should have been given, and the judgment rendered for the defendant, because there is no evidence showing that the injuries complained of were occasioned by the negligence of the defendant.

Turner, Hinton & Turner and *Joe H. Cupp*, for respondent.

This court will not review questions touching the weight of evidence. *Krider v. Milner*, 99 Mo. 145, and cases cited. Then the sole question for this court to consider on this first point is, whether or not there was any evidence to support the verdict and judgment of

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the trial court. There was abundance of evidence to justify the trial court in not sustaining appellant's demurrer to the respondent's evidence.

ELLISON, J.—Plaintiff sued defendant for damages on account of injuries inflicted on his yearling colt, and recovered judgment.

The evidence tended to show that defendant, in the character of an agister, took the colt to pasture at his farm in the spring of 1891, but that on its becoming sick with distemper he had plaintiff take it away, with the understanding that it should be returned during the summer; that in July defendant told him to turn it in the pasture, which he did; that defendant had then in the pasture, unknown to plaintiff, a dangerous and vicious horse, known as the Pape horse, and that this horse kicked the colt on the leg, breaking it, so that it was necessary to kill the colt. There was evidence tending also to show, in our opinion, that defendant knew of the vicious and dangerous character of the Pape horse, and, also, evidence from which it may legitimately be inferred that defendant knew plaintiff's colt had not been altered. The fact of the colt's age, and that he had been in the pasture only a few months before, together with the testimony that "it was perfectly apparent that he was a stud," is enough to justify a finding of knowledge. The statement, said to have been made by plaintiff to defendant when he returned the colt to the pasture, that "he was all right," evidently had reference to the distemper with which it had been afflicted. We need not go further into an analysis of the evidence, since what we have said disposes of the defendant's contentions, and will only add that there is nothing in the case which would justify us in overturning the finding made by the trial court. The judgment is affirmed. All concur.

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THE TUDOR IRON WORKS, Appellant, v. A. C. HITT, Respondent.

Kansas City Court of Appeals, April 4 and 25, 1892.

1. **Fixtures:** ERECTION ON REALTY WITH LICENSE. When one places an erection upon the land of another with his permission, with the intention that it is to be held as the property of the builder, it continues personal property, and the owner may remove it when the license is withdrawn.

2. ——: COMMON LAW: AGREEMENT. The rules of the common law relating to buildings and structures erected by the lessee are liable to be modified by the agreement of the parties on the subject, and so far as such agreement extends the question is no longer what is the common law, but what have the parties agreed.

3. —— : TIES AND IRON RAILS. Ties and rails laid down on a road-bed and fastened so that cars can pass over them become annexed to the realty, and are not personal property unless made so under an expressed or implied agreement for that purpose.

4. ——:——: SEVERANCE: REPLEVIN. If such ties and rails by any means become severed from the realty, they become the personal property of the land-owner, and are the proper subject of replevin.

Appeal from the Audrain Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED.

Geo. Robertson, for appellant.

(1) The only question in the case is whether the railroad ties, under the circumstances, are personal property or real estate. If personal property, then plaintiff was entitled to a verdict for possession, and the court erred in refusing the instructions asked by it, and, if real estate, the case should have been dismissed. The defendant consented to the placing of the track upon his land, and as between him and the railroad company, or one claiming under it, it remained per-

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sonal property. "A building or other fixtures, which is ordinarily a part of the realty, is held to be personal property, when placed upon the land of another by contract or by consent of the owner." *Hines v. Amient*, 43 Mo. 298; *Neiswanger v. Squier*, 73 Mo. 198; Tiedeman on Real Property, sec. 2. "Fixtures are those things which, personal in their nature, become realty by reason of their annexation to the soil, such annexation being made by some one having an interest in the soil. They are removable or not, according to the circumstances of each case." Tiedeman on Real Property, sec. 3. (2) In this case there was never any contract of purchase. Defendant had simply agreed that Garland might buy the land if he, Garland, so chose within a certain time. Even had there been a contract of purchase with the railroad company the defendant could not have retained the rails and ties. *Waters v. Reuber*, 16 Neb. 99; *Little v. Wilford*, 31 Minn. 173; *Rush Co. v. Stubbs*, 25 Kan. 322. (3) The mortgage was given upon the "cross-ties, iron and roadbed, as it was then or might thereafter be constructed." The work of laying the ties and rails into the road was not done until after the mortgage was made and recorded. Thus showing that the mortgage was given upon the ties and iron while it was personal property. Therefore, plaintiff's title to them was acquired while they were the personal property of the railroad company, and defendant could acquire no title as against this mortgage. *Earea v. Estes*, 10 Kan. 314; *Tifft v. Horton*, 53 N. Y. 537; *Ford v. Cobb*, 20 N. Y. 343; *Brand v. McMahon*, Am. Dig. for 1891, p. 1893. (4) Under the conditions of the bonds at the time this suit was begun two installments of interest were due, being in amount $600. The condition being broken, the beneficiary was entitled to the possession of the mortgaged property. Cobbey on Replevin, sec. 176; *Barnett v.*

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Timberlake, 57 Mo. 499; *Sheble v. Curdt*, 56 Mo. 437; *Jackson v. Cunningham*, 28 Mo. App. 354. (5) The first question was to determine if the property be real or personal estate. If real estate, the cause should have been dismissed. Cobbey on Replevin, sec. 371; *Elliott v. Block*, 45 Mo. 373; *Morrison v. Yancey*, 23 Mo. App. 670.

W. H. Kennan and *F. R. Jesse*, for respondent.

(1) The evidence in this case clearly shows that the physical condition of the property in dispute in this case was such as to make it a part of the realty, and as between the parties to this suit the rule of the common law, "*Quicquid plantatur solo, solo cedit,*" applies. And for this reason the sheriff's execution and sale thereunder conveyed no title to the property to the plaintiff. *State to use v. Marshall & Co.*, 4 Mo. App. 29; *Donnewald v. Real-Estate Co.*, 44 Mo. App. 350; *Pemberton v. King*, 2 Dev. L. (N. C.) 376. (2) The evidence in this case showed that the street railroad was put down on the land of defendant by the Mexico Street Railroad Company while said company was in possession under a contract of purchase, and, therefore, became a part of the realty. *Railroad v. Crawford*, 68 Mo. 80; *Kingsley v. McFarland*, 82 Me. 231. (3) The evidence clearly shows that Mexico Street Railroad Company put the said street railway on the land of defendant with the intention of making it a permanent annexation to the realty, and, therefore, become a part of the land. *Rogers v. Crow*, 40 Mo. 91. (4) The judgment is in form as required by law, and is the only one that can be given in cases of this kind. R. S. 1889, secs. 7489, 7490; *Chapman v. Kerr*, 80 Mo. 158. (5) The mortgage introduced by plaintiff can have no bearing on this case.

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SMITH, P. J.—The plaintiff, a business and manufacturing corporation, brought its action of replevin against defendant to recover a certain number of cross ties and iron rails. It appears from the evidence that the defendant gave one Garland, who was president of the Mexico Street Railroad Company, a sixty-day option to purchase a certain tract of land. Before the expiration of this option the Mexico Railroad Company applied to defendant for permission to put its railroad down over the land it embraced. Defendant refused to permit it to be done, unless the railroad company would agree to buy the land. The manager of the company then said to defendants, "they were going to take the ground, that they would not come and build up his property and run the road through without they were going to take the ground. He said they did not have the money to pay down as they had been at a great deal of expense, but there was no doubt that they would take the ground." The evidence is uncontradicted that the defendant would not have granted the railroad company the license to lay its track down on his land had he not been induced to do so by the assurances of its manager that the company would buy the land under the option he had given to its president. Under this permission the roadway was located, and the ties and iron rails were placed thereon. The iron rails were firmly spiked down to the ties, and dirt placed between them so as to make a track for the horses which were to pull the cars over the line. The road was operated a few days, when its further operation was abandoned. The railroad company did not take the defendant's land under the option.

The plaintiff had sold the street railroad company the iron rails used by it in constructing its road. The plaintiff afterwards obtained judgment against said

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railroad company for the purchase price of the iron rails, and caused the ties and iron rails to be levied upon and sold by the sheriff under an execution issued on said judgment, and at which sale plaintiff became the purchaser. It seems that the street railroad purchased all the iron rails used in laying the track of the plaintiff, and executed to it a deed of trust thereon with other property to secure the purchase price of the iron rails so purchased. But as this deed of trust is only mentioned in the abstract we are not advised as to its provisions. The finding and judgment of the court was for defendant. The plaintiff has appealed.

The only question here is whether the ties and iron rails in question were so annexed to the defendant's land by the railroad company as to become a part thereof and by that means lost their personal nature. It is conceded that the defendant gave the railroad company the privilege to enter upon his land and to locate, construct and operate its railroad over the same. It was a long time ago declared in this state that when one builds a house or fence or places any other erection upon the land of another with his permission, with the intention that it be held as the property of the builder, it continues personal property, and the owner may remove it when the license is withdrawn. *Hines v. Amient*, 43 Mo. 298; *Matson v. Calhoun*, 44 Mo. 368; *Lowenberg v. Bernd*, 47 Mo. 297. In 1 Washburn on Real Property, 4, it is said, "If a man by permission of another erects a house upon the other's land, it will, if the builder have not estate in the same, be the personal property of the builder, *if such be the agreement with the land-owner.*" The rule thus stated by this author is supported by the ruling in *Hinkly v. Black*, 70 Me. 473, and *Lapham v. Norton*, 71 Me. 85; *Dunn v. Dunn*, 38 N. H. 429, and *Korbe v. Barbone*, 130 Mass. 255, and perhaps in other cases. The rules of the

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common law relating to the rights of lessor and lessee in buildings and other structures erected by the lessee upon the leased property, and in such things as are annexed thereto, are liable to be modified by the agreement of the parties on the subject, and so far as such agreement extends the question is no longer what is the common law, but what have the parties agreed. *Dunn v. Dunn*, 38 N. H. 429; *Foley v. Addenbroke*, 13 M. & W. 174.

In this case there is nothing in the evidence tending to show that there was any agreement made by the railroad company with the defendant that the ties and rails used in the construction of its track over defendant's land, under the license given by defendant, should thereafter be the personal property of the railroad company. But the concurrent intention or agreement of the parties for the separate ownership and right of removal may be implied from the circumstances and the conduct of the parties. *Korbe v. Barbone*, 130 Mass. 255; *First Parish, etc., v. Kones*, 8 Cush. 184. The ties and rails placed on the roadbed of said railroad were not personal property (*Hart v. Railroad*, 7 Mo. App. 446), unless made so under an expressed or implied agreement for that purpose, and there was not, as we have seen, any such expressed agreement proved. It is not perceived that it can be fairly implied from the circumstances and the conduct of the railroad company and the defendant, as is disclosed by the evidence, that there was an agreement or concurrent intention that the ties and iron rails which were used in the construction of the railroad track were to be held by the railroad as personal property. The conditions under which the defendant was induced to grant the railroad the license under which it entered and built its road over his land unmistakably indicates that the road was to be permanent. The fact that the company had

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taken an option on defendant's land, coupled with the assurance by the manager of the road that if the company did not intend to take the land they would not put the road there, repels any implication that it was the purpose of the company that the track and the ties and rails entering into it were not to be permanently annexed to defendant's land. The further fact that the railroad company had laid out an addition to the city of Mexico, and were extending its railroad to the addition for the purpose of inducing the purchase of lots in such addition, shows that it was intended that the road was to be permanent. It is not to be supposed that the company intended to build its railroad to the addition it had laid out, offer and sell its lots therein to purchasers who would buy on the faith that the road would be permanent, and to then abandon the operation of the road; for that would be a fraud. We must indulge every inference in favor of honesty and fair dealing. The mere fact that the ties and iron were employed in the construction of this railroad raises the inference that the road was intended to be a permanent annexation to the land.

Again, if the road was constructed on the defendant's land under an agreement to purchase, of which there is some evidence, then the road and materials entering into its construction became a part of the land, so that in no view which we are able to take of the case can we find that there was any mutual intention or agreement of the parties that the ties and iron were to be personal property, and that the railroad company should have the right to remove the same. We see no reason why the ordinary rule, that where ties and rails laid down on a roadbed and fastened so that cars can pass over them become annexed to the realty in the absence of an agreement, changing the ordinary rule of law, should not apply in this case. Tyler on Fixtures,

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144; *Weisslon v. Ins. Co.*, 4 Metc. 306; *Pierce v. Goddard*, 22 Pick. 306; *Richardson v. Copeland*, 6 Gray, 536.

If the ties and rails in controversy became severed by the act of the sheriff or the railroad company, they became personal property of defendant, the owner of the land, and were the proper subjects of replevin, though they had been part of the land and sold by the sheriff. Tyler on Fixtures, 70. So that it follows that the judgment of the circuit court finding the value of the ties and rails was not erroneous.

The deed of trust is not before us, and if it was we do not think that it would alter the rules of law which we have applied in the solution of the question presented. It is not contended that the defendant was a party thereto, and is in any way estopped by its provision.

The judgment is affirmed. All concur.

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A. C. DINGLE, Administrator, Respondent, v. WILLIAM POLLICK *et al.*, Appellants.

Kansas City Court of Appeals, April 25, 1892.

1. **Probate Court:** DEMAND AGAINST ESTATES: JUDGE IN VACATION. Claims against the estates of deceased persons must be presented to and allowed by the probate court while in session as such, and not to the judge in vacation.

2. ———: JUDGE IN VACATION: ENTRY OF JUDGMENT AFTER LIMITATION: ANTEDATING SAME. For the probate judge in vacation and after expiration of the two years' limitation to enter judgment against an estate as of a prior date so as to redeem it from the bar of the statute, is a wrong, and a legal fraud against the estate.

3. **Pleading:** FRAUDULENT ENTRY OF JUDGMENT. In a petition seeking to set aside a judgment entered by the judge in vacation, etc., it is not necessary to allege in terms that the entry thus made was conceived in fraud, etc. It is sufficient to state the facts, and in this case the facts stated and proved constitute fraud in law.

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4. **Equity:** JURISDICTION OF: FRAUD: STATUTE. Fraud belongs to the original jurisdiction always exercised by a court of equity, and constitutes its most ancient foundation, and such jurisdiction is not ousted because a remedy exists at law; for the jurisdictional powers formerly possessed by that court still continue unaffected by the enlargements which are taking place in the functions of the courts of law, and will not be extinguished by anything short of direct and positive and prohibitory enactment; and section 213, Revised Statutes, 1889, providing for vacating improper allowances, etc., does not operate to oust a court of equity of its jurisdiction to set aside a judgment fraudulently procured and wrongfully entered.

5. **Administration:** PROOF OF NOTICE OF LETTERS: EVIDENCE. The statutory mode of proof of notice of letters of administration does not exclude other competent evidence of the fact such as the testimony of the publisher supported by the files of his paper.

Appeal from the Audrain Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED.

W. W. Fry and *W. A. Edmonston*, for appellants.

(1) Plaintiff's bill contains no equities, and does not state facts sufficient. It neither charges fraud, accident nor mistake. Fraud and collusion must be alleged and proven. *Smith v. Sims*, 77 Mo. 269; *Reed v. Bott*, 100 Mo. 62; *Murphy v. DeFrance*, 101 Mo. 151. (2) Plaintiff's remedy was at law. If defendants' claim was improperly allowed the statute gave the remedy. He had four months to question it. R. S. 1889, sec. 213; R. S. 1879, sec. 216. (3) Was defendants' claim improperly allowed? Was it barred by two years' limitation? R. S., sec. 184. The limitation did not begin to run in this case, because there was no publication of notice of letters. R. S., sec. 184. Such notice must be published, and a copy of the same, with affidavit of the publisher, filed with the clerk of probate court, and by him recorded in a book kept for that purpose. R. S., secs. 86, 87, 88, 89. The record

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shows this was not done, and defendants were not barred. The parol evidence of the publisher was improper. The claimant is required to go to the record only, and if that does not show such notice he has no notice. R. S., sec. 88. If the notice was sufficient there is no evidence of knowledge of the publication of such notice to these defendants. (4) Notice of defendants' demand was waived by plaintiff, December, 1887. R. S., sec. 198. The claim was handed to the court within the two years, and it being a note it was evidence of itself, and the claim was in effect allowed from date of notice. R. S., sec. 199. The court indorsed it, allowed September 12, 1889. We insist that it was properly allowed, whether the indorsement of allowance was made before or after the expiration of the two years. *Jones v. Davis, Adm'r*, 37 Mo. App. 69. Under the facts in the case, even if plaintiff's bill is sufficient, the evidence does not support the court's finding, and plaintiff's bill should be dismissed.

Geo. Robertson, for respondent.

(1) The date of the letters of administration was October 4, 1887. Notice was published within thirty days thereafter. The claim was, therefore, barred within two years from the date of the letters. R. S. 1889, sec. 184. The claim must not only have been presented to the administrator, but to the probate court, within two years from the date of letters. R. S. 1889, sec. 188; *Price v. McCanse*, 30 Mo. App. 627. (2) Plaintiff had no remedy at law. Section 213, Revised Statutes, 1889, is not intended for this kind of a case. This section applies only to allowances improperly allowed by the court, and does not apply where there is, in fact, no allowance; simply, as in this, an utterly void judgment placed upon the record by the clerk.

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This is a case, where, so far as the records are concerned, there is a valid judgment of allowance, but it was not allowed by the court. The clerk of the court entered it upon the records, not as a court, but in such a way as to make it *prima facie* upon the record a judgment. (3) It is true the petition does not, in terms, charge collusion and fraud, but it states simply the facts, which are fully supported by the evidence. They are, in effect, a collusion between the defendants and the judge of the court, and operate as a fraud upon decedent's estate. The petition is sufficient, although it does not charge fraud and collusion, or either, in direct terms, but does so in effect. The petition is sufficient, and states a case for equitable relief. *Mayberry v. McClurg*, 51 Mo. 256; *Stewart v. Caldwell*, 54 Mo. 536; *Smith v. Sims*, 77 Mo. 269. Any concealment or omission that wrongs the estate must be considered as fraudulent, without reference to the motive that dictates it. *Clyce v. Anderson*, 49 Mo. 37; *Houts v. Shepherd*, 79 Mo. 141. (4) The evidence of the publisher was admissible to show the publication of the administrator's notice, after it was shown that there was no record of it in the probate judge's office. *Davis v. Hilton*, 17 Mo. App. 319; *Compton v. Arnold*, 54 Mo. 147; *Addis v. Graham*, 88 Mo. 197.

Gill, J.—This is a suit in equity to set aside and hold for naught an alleged judgment of allowance in favor of defendants against the estate of John C. Dingle, deceased, of which plaintiff is the administrator. On a hearing before the circuit court, a decree was entered for the plaintiff, and defendants have appealed.

The record discloses the following state of facts: On October 4, 1887, letters of administration were

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issued to the plaintiff, and notice thereof was given within thirty days. Defendants held a promissory note against the estate, and in December, 1887, presented the same to the administrator, who waived notice thereon. But defendants failed to present, and have allowed, their said claim during the two years following the granting of the letters of administration. However, shortly after the expiration of the two years the claim was presented to the probate judge in vacation, and he proceeded to, and did, write up, and enter on the probate records, an allowance in favor of the defendants; and, to save the operation of the statutory bar of two years, the so-called record of allowance was dated back so as to come within the two years. This was not discovered by the plaintiff administrator until a few months thereafter, and, thereupon, this suit was instituted in the circuit court, wherein it was alleged that said pretended judgment of allowance was void, etc., that defendants were seeking to enforce the same, and the court was asked to set aside the judgment, etc.

We discover no reason to disturb the judgment of the circuit court. Viewed in the light of the admitted facts, this pretended order of allowance was an absolute nullity and a fraud on the estate. Claims against the estates of deceased persons must be presented to, and allowed by, the probate court while in session as such, and not to the judge in vacation as in this case. This judge was *ex officio* his own clerk (as provided under the statute, he might be); and his action in passing on defendant's claim and entering said judgment of allowance was, under the circumstances here detailed, nothing more than the act of any other clerk of a court of record who might assume in vacation to hear a controversy and declare the court's judgment. The probate judge, when assuming to pass on defendant's claim in vacation, was not the *probate court;* no more so, indeed,

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than if the like had been done by one entirely outside the court's machinery.

This attempted allowance, too, was a wrong and a legal fraud against the estate, regardless, too, of the good or bad motives of the judge. The two years' limitation within which the claim should have been presented had expired, and the administrator, with a view of paying the same, had taken from the probate records a list of allowed claims. But thereafter the judge, in vacation (acting as an individual, and not as the court), seeks to add to the estate's indebtedness by unlawfully passing on defendants' claim, and entering judgment as of a prior date, so as to redeem the claim from the bar of the statute.

Defendants make some objection to the petition in that it is not alleged in terms that the entry thus made by the probate judge was conceived in fraud, etc. This was not necessary. It is sufficient under our practice to state the *facts;* it is not required to allege the conclusions of law. The facts here stated and proved constitute a fraud in law, and it is the peculiar province of courts of equity to deal with such cases. *Smith v. Sims*, 77 Mo. 274. This fraud, too, is in the *procuring* or entering a judgment. *Murphy v. DeFrance*, 101 Mo. 157. See, also, *Mouts v. Shepherd*, 79 Mo. 144; *Clyce v. Anderson*, 49 Mo. 41; *Stewart v. Caldwell*, 54 Mo. 539.

Defendants' counsel further contend that this suit in equity ought not to be maintained, because of section 213, Revised Statutes, 1889, which provides for vacating improper allowances, etc. Even to admit that in this case relief of some sort was obtainable under the provisions of this section, yet it may be well said here as in *Stewart v. Caldwell, supra:* "But fraud belongs to the original jurisdiction always exercised by a court of equity and constitutes its most ancient foundation;

and such jurisdiction is not ousted because a remedy exists at law, for the jurisdictional powers formerly possessed by that court still continue unaffected by the enlargement which is taking place in the functions of the courts of law, and will not be extinguished by anything short of direct and positive prohibitory enactment." This action is one to set aside a judgment fraudulently procured and wrongfully entered; and, as already said, is peculiarly within equity jurisdiction. *Cooper v. Duncan*, 20 Mo. App. 399.

The only matter remaining, and which deserves mention, grows out of the manner of proof offered by the plaintiff to show that he gave the notice of granting letters of administration to him. At the trial, it appeared from the testimony of the administrator as well as that of the probate judge, uncertain whether or not the administrator had ever filed in the probate court an affidavit of the publisher of the newspaper, to the fact that the notice had been inserted in the paper. At all events the probate judge testified that if such an affidavit had ever been filed it had been mislaid, that he was unable to find it, and that it was never spread upon the records of his office. The plaintiff was then permitted, over the defendants' objection, to show by the publisher of the paper, supported by the files of his paper, that such notice was published as required by section 86 of the administration statute. It was insisted on the part of defendants that such proof of publication could only be established by a production of the publisher's affidavit filed in, and spread on the records of, the probate court. Now while sections 87, 88 and 89, Revised Statutes, 1889, provide for such proof; that is, that the affidavit of the publisher spread on the probate records "shall be received in evidence in all courts of this state," yet we held in *State ex rel. v. Skires*, 39 Mo. App. 560, that such statutory mode of proof of

notices in administration does not exclude other competent evidence of the fact. Adhering now to the opinion there expressed, we hold that the court properly admitted the evidence objected to.

Judgment affirmed. All concur.

ALEXANDER KIDD, Respondent, v. R. H. JOHNSON, Appellant.

Kansas City Court of Appeals, April 25, 1892.

Replevin: DELIVERY. Where plaintiff would not surrender property except under compulsion, and the constable, though unarmed with process, demanded the property as an officer, and asserted that it was his duty as such officer to take it, then plaintiff ceased to resist or protest, and the property was taken, *held* it was not a voluntary turning over of possession, and plaintiff could maintain replevin for its recovery.

Appeal from the Audrain Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED.

P. H. Cullen and *W. W. Fry*, for appellant.

The property was taken with plaintiff's consent, and the demurrer to the evidence should have been sustained. Plaintiff admits that he thought Moore was acting as an officer and delivered him the property. His ignorance was no ground for this suit. If not wrongfully taken, but only wrongfully detained, then a demand of defendant was necessary to maintain this suit. There was no demand alleged or proven. *Nanson v. Jacob*, 93 Mo. 331; *Reno v. Kingsbury*, 39 Mo. App. 240.

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Geo. Robertson, for respondent.

The property was not taken with plaintiff's consent. He refused to give it up, and Moore, who was deputy constable, demanded it by virtue of his office—demanded it in his official capacity. No demand under this state of fact was necessary, as defendant's possession was tortious. There was no breach of the conditions of the mortgage. Plaintiff had the right to the possession. *Cole v. Railroad*, 21 Mo. App. 443; Cobbey on Replevin, secs. 447, 453.

Ellison, J.—This action is replevin in which plaintiff recovered below, and defendant appeals. Plaintiff gave a chattel mortgage on some dairy cows to secure his note for $300. He made considerable payment on the note before due, after which it was sold by the holder to defendant, the purchase being made before due, but with notice of the payments. The mortgage contained a provision permitting the mortgagor to retain possession until default, but with the additional provision that if there was an unreasonable depreciation in the value of the property mortgaged, the mortgagee might take it into his possession. Before the note became due, defendant got a constable to go with him to plaintiff's premises for the purpose of taking the cows. Plaintiff refused to give them up until the constable informed him that it was his duty as an officer to take them, under the mortgage which he had with him. Plaintiff then made no further resistance, and the constable, together with defendant, took the cows away, and plaintiff instituted this action.

Some of the foregoing facts were not disputed; what were disputed had evidence tending to support them. Plaintiff's testimony shows clearly that he would not have surrendered the property, except under

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compulsion. The constable, though not armed with process, demanded the property as an officer, and asserted that it was his duty as such officer to take it. Plaintiff then ceased to resist or protest, and the property was taken. This was not a voluntary turning over of possession.

The question whether there was an unreasonable depreciation of the property, and the measure of damages, was submitted to the jury under instructions, which, when taken in connection with defendant's, are not the subject of valid objection.

The judgment will be affirmed. All concur.

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THE STATE OF MISSOURI, Respondent, v. HENRY HAYCROFT, Appellant.

Kansas City Court of Appeals, April 25, 1892.

1. **Criminal Procedure:** TWO COUNTS: GENERAL VERDICT. In the justice's court the information contained two counts, and there was a general verdict of guilty. On appeal in the circuit court there was a trial on the first count only and a verdict of guilty. It was contended that, since the verdict in the justice's court was silent as to which count the finding was on, it amounted to an acquittal on one count, and as the counts were for the same offense it amounted to an acquittal on both. *Held*, the contention was not allowable.

2. ———: ARRAIGNMENT. In misdemeanors there should be an arraignment; but, if made and entered in the justice's court, there need be none in the circuit court.

Appeal from the Audrain Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED.

Geo. Robertson, for appellant.

(1) In the first count the defendant was charged with disturbing the peace of a family; in the second

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count, with disturbing the peace of individuals, who composed the family, naming them. The offense charged in each count was identical. The silence of the jury in the justice's court on either count is an implied acquittal of the defendant on the other. *State v. Smith*, 53 Mo. 139; *State v. Ball*, 27 Mo. 324; *Guenther v. People*, 26 N. Y. 100; *State v. Beldin*, 33 Wis. 120. It is impossible to say on which count he was convicted in the justice's court, so it is impossible to say upon which he was acquitted. When the state put him to trial upon the first count of the information, it may have put him to trial upon the one on which he stood acquitted. One thing may be confidently asserted, and that is, that he was in jeopardy before the justice upon the charge for which he was tried in the circuit court. Now, suppose the jury had brought in a verdict, or rather verdicts, one finding defendant guilty, the other acquitting him—for a finding of guilty on one count and silence on the other is equivalent to these two contradictory verdicts—could he not successfully have said that he had once been in jeopardy on the same charge to another prosecution? Is it not equivalent to the discharge of a jury after it is sworn, to try the cause, and the trial commenced before them? In that case there is no doubt but such a discharge of the jury operates as an acquittal. Cooley's Constitutional Limitations, 325, *et seq.* The general rule is that one trial and verdict protect the defendant against any subsequent accusation, whether the court be satisfied with the verdict or not, and whether it be for or against him. *State v. Martin*, 30 Wis. 219. (2) In the whole record there does not appear to have been any arraignment and plea of the defendant in the circuit court. There appears in the bill of exceptions only the following: "The state proceeded with the trial [the defendant having pleaded not guilty to the charge], and

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presented to the jury only the first count," etc. These words in brackets were inserted by the prosecuting attorney after the bill had been submitted to him for examination. There is no plea of "not guilty" upon the record. The arraignment and plea must be shown in the record proper. The bill of exceptions is no part of the record. *Johnson v. Hodges*, 65 Mo. 589; *State v. Barrett*, 63 Mo. 300; *State v. Cheek*, 63 Mo. 364. The plea must be entered upon the record before there can be an issue for trial. *State v. Saunders*, 53 Mo. 234; *State v. Barnes*, 59 Mo. 154; *State v. Andrews*, 27 Mo. 264. In the circuit court the case is tried anew, and the plea should there be entered. *State v. West*, 84 Mo. 440.

F. R. Jesse, for respondent.

(1) The two counts in the information being "different statements of the same cause of action," a general verdict is good, and the verdict of the jury in the justice's court finding defendant guilty as charged was proper, and did not operate as an acquittal of the defendant on either count. *State v. Bean*, 21 Mo. 269; *State v. Pitts*, 58 Mo. 556; *State v. Bedell*, 35 Mo. App. 551. (2) The record shows that the defendant was arraigned in the justice's court, and pleaded "not guilty," which was sufficient.

Ellison, J.—Defendant was convicted of a misdemeanor before a justice of the peace under section 3784, Revised Statutes, 1889. He appealed to the circuit court where he was again convicted, and he comes here for a review of the case. The information is in two counts, but it is conceded that they are for the same offense. Defendant's conviction in the justice's court was general, without mentioning either count. In the circuit court, the record shows that he was proceeded

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against on the first count. He endeavored to abate the cause in the circuit court, upon the idea as we gather it from the brief, that since the verdict of the jury in the justice's court was general, and was silent as to the count upon which he was found guilty, it amounted to an acquittal on one count, and, as the counts were conceded to be for the same offense, it amounted to an acquittal on both counts. This contention cannot be allowed. When there is but one offense charged in separate counts, a general verdict is sufficient, and defendant's suggestions have no application to such a case. He was tried and convicted before the justice for only one offense, and before the circuit court, on appeal, for the same offense, and where anything occurred to abate the cause in the circuit court we are not able to discover.

II. It is next urged that the conviction is void for the reason that defendant was not arraigned in the circuit court. In misdemeanors there should be an arraignment. *State v. Geiger*, 45 Mo. App. 111. But if such arraignment is made and entered in the justice's court there need not be a rearraignment in the circuit court on appeal.

The judgment is affirmed. All concur.

W. A. Edmonston, Respondent, v. G. A. Wilson, Appellant.

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Kansas City Court of Appeals, April 25, 1892.

1. **Animals:** INCREASE OF. The increase of the females of live stock belongs to the owner of the dam at the time.

2. **Chattel Mortgage:** GROWING CROP. A chattel mortgage given after seed sown had sprouted and made its appearance above ground as a growing crop covers the grain when it comes into existence.

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3. ———: OFFSPRING OF DOMESTIC ANIMALS. When the owner of domestic animals gives a mortgage during the period of gestation, the mortgagee will, against the mortgagor, be entitled to the offspring when born.

4. ———:———: REGISTRATION: THIRD PARTY. The registration of a chattel mortgage is equivalent to a transmutation of possession; and a mortgage described the animal as one bay mare in foal, etc., and was duly recorded; the purchaser of the mare's colt when between five and six months old, and still following its dam, will be presumed to know that the mortgage was given during the pregnancy of its dam, and that it, too, was subject to the lien of that instrument.

Appeal from the Audrain Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED.

W. W. Botts, for appellant.

(1) The increase of animals belongs to the usufructuary. *White v. Storms*, 21 Mo. App. 288; *Stuart v. Ball's Adm'rs*, 33 Mo. 156; 2 Kent's Commentaries, 360, 450. The mortgagor being in possession of the property in this case was the usufructuary. (2) The mortgagee has no right to the increase of animals described in his mortgage as against a purchaser without actual notice of his claim to such increase, when the mortgage does not in terms cover the increase, and when the mortgaged animal is left in the possession of the mortgagor. Jones on Chattel Mortgages, sec. 150; *Boggs v. Stankey*, 14 N. W. Rep. 392. (3) It is held that a mortgage of domestic animals covers their increase, but this would be the case, in the absence of an express stipulation that the increase shall be included, only as long as it is necessary for the young to follow the dam for nurture. Tiedeman on Sales, sec. 231, p. 365; *Winter v. Landphere*, 42 Iowa, 471; *Thorpe v. Cowles*, 55 Iowa, 408; *Kellogg v. Lovely*, 46 Mich. 131.

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W. W. Fry, for respondent.

It is well-settled law that the increase of the dam follows it. A mortgage on the female covers the increase, whether mentioned or not. In our case the increase is mentioned in the mortgage, and, of course, is included. *Lewis v. Davis*, 3 Mo. 133; *Clark v. Henry*, 9 Mo. 336; *Garth v. Everett*, 16 Mo. 490; *Herndon v. Herndon*, 27 Mo. 421; *Stewart v. Ball*, 33 Mo. 154; *White v. Stevens*, 21 Mo. App. 288; *Kellogg v. Lovely*, 8 N. W. Rep. (Iowa) 699; *Frank v. Paul*, 24 N. W. Rep. (Minn.) 419; *Rodgers v. Highland*, 29 N. W. Rep. 429; Jones on Chattel Mortgages [3 Ed.] sec. 149. The last four cases cited are chattel mortgage cases.

Smith, P. J.—This was an action of replevin to recover the possession of a colt. The facts as we learn them from the evidence are that in January, 1889, one Walker executed to plaintiff a deed of trust conveying to him, amongst other personal property, "one bay mare, fifteen hands high, in foal by N. Barnes' horse," to secure a certain promissory note therein mentioned which was duly recorded. The colt in question was foaled by the mare on the first of May, 1889. On October 4, following, the defendant purchased the colt of Walker while it was following the mare. Colts are usually weaned when six months old, but "often run longer." Walker made default in the payment of the debt secured by the deed of trust, and the plaintiff under its provisions was authorized to take possession of the property covered by it. Plaintiff discovering that the defendant was in possession of the colt demanded it, which demand being refused, he brought this action. The plaintiff had judgment in the circuit court, and the defendant has appealed.

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The law is well settled in this state that the increase of the females of live stock belongs to the owner of the dam at the time. *White v. Storms*, 21 Mo. App. 288; *Stewart v. Ball*, 33 Mo. 156; *Louis v. Davis*, 3 Mo. 98; *Garth v. Everett*, 16 Mo. 490; *Herndon v. Herndon*, 27 Mo. 421. When a chattel mortgage has been given after the seed sown has sprouted, and made its appearance above the ground as a growing crop, it is operative and covers the grain when it comes into existence as the product, or as an accession to what was growing when the mortgage was given and covered by it. *Funk v. Paul*, 64 Wis. 35; *Bryant v. Pennel*, 61 Me. 108; *Condennan v. Smith*, 41 Barb. 404. And upon a like principle when the owner of a domestic animal gives a mortgage during the period of gestation, the mortgagee will, against the mortgagor, be entitled to the offspring when born, *McCarty v. Bewins*, 5 Morg. 195; *Hughes v. Graves*, 1 Litt. (Ky.) 317; *Evans v. Meneken*, 8 Gill & J. 39; *Fowler v. Merrill*, 11 How. (U. S.) 375; *Kellogg v. Lovely*, 46 Mich. 131. It is contended by the defendant that, even if the deed of trust should be held to cover the colt as between plaintiff and Walker, yet as it is not described, or in any way referred to in the plaintiff's mortgage, the filing of it was not constructive notice to the defendant, and, hence, his deed of trust gives him no superior right. Our statute makes the registration of a chattel mortgage equivalent to the transmutation of possession, and in many instances satisfies its requirements in respect to the change of the possession of the mortgaged property. *Hellman v. Pollock*, 47 Mo. App. 205. Such registration is constructive notice to third parties subsequently dealing with the property as to the rights and interests of the mortgagee in the property. Such constructive notice is coextensive with the contents of the mortgage so registered. But it is not notice of facts existing

outside of it and in no manner referred to it, unless the contents of the mortgage together with the other facts and circumstances connected with the mortgaged property, or its possession are such as to give actual or constructive notice of rights of the mortgagee to those subsequently dealing with the property, or, at least, sufficient to put them upon inquiry. At the time the defendant, who was a farmer and stock-raiser himself, saw the colt in question following its dam, and purchased it of Walker, he must be held to have known that she was the mare covered by plaintiff's deed of trust, and in foal in the previous January by Barnes' horse. He must have known that the colt was none other than the one the mare was in foal with when the plaintiff's deed of trust was registered. The fact that the colt was following the mare within the usual period of nurture was another circumstance calculated to notify one engaged in defendant's business, that it was the offspring of the mortgaged mare, or at least was sufficient to put him on his inquiry. The defendant must be presumed at the time of his purchase of the colt to have known that the deed of trust was given during the pregnancy of its dam, and that it, too, was subject to the lien of that instrument. So that defendant in no sense is a *bona fide* purchaser without notice of the plaintiff's lien. The most he purchased was Walker's equity of redemption. He purchased the colt *cum onere*. *Rogers v. Highland*, 29 N. W. Rep. 429. No error is perceived in the action of the trial court in the giving and refusing of instructions, so that it results that the judgment must be affirmed. All concur.

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JAMES HARRIGAN, Respondent, v. JOHN S. WELCH, Appellant.

Kansas City Court of Appeals, April 25, 1892.

1. **Delivery:** EVIDENCE: DEMURRER. The evidence in this case as to the delivery of a certain heating apparatus is reviewed, and it is *held* it justified the submission of the case to the jury.

2. ———: INSTRUCTIONS. Instructions on the question of delivery, set out in the opinion, are *held* sufficient when taken in their entirety to submit the issues to the jury, and though subject to verbal criticism are not misleading or prejudicial.

3. **Principal and Agent:** AGENT SUING IN HIS OWN NAME: COMMON LAW: STATUTE. Where a contract is in terms made with the agent personally, he may sue on it, although the fact of the agency and the name of the principal are known, and this rule holds under the statute as well as at common law.

Appeal from the Buchanan Circuit Court.—HON. HENRY M. RAMEY, Judge.

AFFIRMED.

Brown & Craig, for appellant.

(1) The fact, that the instruction complained of directed the jury that they might find for the plaintiff on a state of facts admitted not to exist, is a fatal objection. *Bender v. Dungan*, 99 Mo. 126; *Harty v. Railroad*, 95 Mo. 368; *Bank v. Overall*, 90 Mo. 410; s. c., 16 Mo. App. 510; *Babb v. Granite Co.*, 41 Mo. App. 642; *Norton v. Railroad*, 40 Mo. App. 642. And the action of the court in giving them another instruction, telling them, in effect, that the first was meaningless, can only serve to aggravate the error. *Nasse v. Algermissen*, 25 Mo. App. 186; *Stone v. Hunt*, 94 Mo. 475; *Frederick v. Allgaier*, 88 Mo. 598. The fact is that the instruction complained of, which is entirely unsupported

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by evidence, is the only one asked by plaintiff, which is founded upon the cause of action stated in the petition. (2) The jury were instructed that plaintiff could recover if the defendant had "treated the heater and radiator as having been delivered." This was evidently submitting to the jury a question of law. Whether he had so treated the property was a conclusion of law to be drawn from all the facts. (3) It is true that an agent having authority to contract for the payment of a sum of money to his principal, and to receive payment thereof, may, if he takes the obligation to himself, sue on it in his own name. He is simply, by the terms of the contract, a trustee for his principal. But if the agency is disclosed, and appears in any way on the contract, the rule is different. Thus, when an attorney gave a receipt by which he acknowledged that he had received of A. B. an agreement between C. and D. "assigned to S. S., to collect the money therein contained," it was held that A. B. being the mere agent of S. S. could not sue the attorney for the moneys collected. Story on Agency, sec. 395. And even in those cases where the contract is in the name of the agent, who could otherwise sue on it, the principal may control it by making other arrangements if he desires. Sec. 403.

Hall & Pike, for respondent.

(1) The rule announced in the instruction is correct. It is so at common law. The general rule is, that where a contract is in terms made with the agent personally he may be sued on it. And this rule applies although the fact of the agency and the name of the principal are known. Mechem on Agency, sec. 755; Story on Agency, sec. 393, *et seq.*; *Snider v. Express Co.*, 77 Mo. 523; *Keown v. Vogel*, 25 Mo. App. 35.

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But independently of the common law the plaintiff could maintain this action. (2) There was a single issue of fact to submit to the jury, and that was whether the defendant ordered the plaintiff to put the boiler in place and distribute the radiators through the house. This issue was submitted to the jury in various instructions, but the jury were clearly told in all of them that, unless they found said issue of fact in favor of plaintiff, they must return a verdict in favor of defendant. It may not, however, be out of place to refer the court to some of the authorities establishing the liability of the defendant for the installment then due, notwithstanding the destruction of the house. They are as follows: *Richardson v. Shaw*, 1 Mo. App. 234; *Haynes v. Baptist Church*, 12 Mo. App. 536; s. c., 88 Mo. 282; *Cleary v. Solmer*, 120 Mass. 210; *Hall v. School Dist.*, 24 Mo. App. 213; 1 Wharton on Contracts, sec. 326; Bishop on Contracts, sec. 588; *Butterfield v. Byram*, 27 N. E. Rep. 667.

SMITH, P. J.—This was a suit on the following contract to recover the $400 installment therein mentioned.

"ST. JOSEPH, MO., November 26, 1889.

"*J. S. Welch, Esq.*

"DEAR SIR:—We propose to furnish and erect in your new residence a hot-water heating plant for the sum of $875, to consist of the following: One number 7 Bolton hot water boiler, and eight hundred and forty-seven square feet of Bundy Elite radiation in seventeen radiators, the radiators to be bronzed and painted to suit, the work to be done in the best manner, and all material to be of the best quality, the hauling of all material used in connection to be done at your expense. Payments are to be made as follows: $100, when the supply and return pipes are in place; $400, when the boiler and radiators are delivered on the premises; $300,

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when the work is completed; $75, thirty days after completion of the job, or after it has been thoroughly tested and found to be according to the contract. The heater and radiators are not to be delivered or put in place until ordered by you.

"JOHN S. WELCH,
"JAMES HARRIGAN."

The plaintiff was a plumber, and the defendant was engaged in the building of a residence for which he contracted with the former for a heater and radiator manufactured at Detroit, Michigan. The heater and radiators were in defendant's house when it was burned, but whether they had been previously delivered to him there, or were only stored by plaintiff there until the defendant should require them to be put in place in the house is the main matter of dispute in this case. The plaintiff had judgment, and the defendant appealed.

I. The appealing defendant contends that the trial court erred in its action in refusing to sustain his demurrer to the evidence. We do not think this contention should be sustained. There was evidence introduced tending to show that the plaintiff had entered into an agreement (the full extent of which is not disclosed by the evidence) with the manufacturers of the heater and radiators mentioned in the contract sued on, by which they were to fill any contract made by plaintiff for the sale thereof in the city of St. Joseph and to bill the same to plaintiff. The special agent of the manufacturers arranged with the defendant in the first instance for the sale of the heater and radiators, but it seems to have been understood all around that the plaintiff was to be regarded as the seller, and that the contract therefor was to be with him. There was evidence, though not undisputed, that the original agreement for the sale of the apparatus was a verbal one. It further appears that under the original agreement

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that the heater and radiators were not to be delivered until ordered by the defendant, but owing to some misunderstanding the special agent of the manufacturers sent them to plaintiff before the defendant had ordered them. On their receipt by plaintiff he notified the defendant of the fact, who consented that plaintiff might store the same in his house then in process of construction, until he should order them put in place.

It further appears that the defendant wrote to the manufacturers complaining that the shipment had been prematurely made, and that their response was that they would make it satisfactory to him. The defendant then wrote up the contract as of the date when he first agreed to purchase and presented it to plaintiff who sent it to the manufacturers who, it seems, signified their approval of it. It was then signed by plaintiff and defendant, and is perfectly consistent with the correspondence between all the parties. There is evidence tending to show that the defendant drew the contract for the purpose of merging into it all previous and existing agreements in respect to the sale and delivery of the heater and radiators, and this end he seems effectually to have accomplished. There was evidence, to say the least of it, that this was the contract, and the only contract, subsisting between plaintiff and defendant at the time defendant's house was burned.

The more doubtful question is whether the evidence of performance of the contract was sufficient to carry the case to the jury, or whether the heater and radiators were ordered by defendant to be put in place before their destruction by the fire that consumed the defendant's house. It is conceded they had been stored in defendant's house as the property of plaintiff. The title would not, of course, pass until there was a delivery under the contract.

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There was evidence, though it was by no means clear and cogent, that while the heater and radiators were stored in defendant's house, that the contractor who had, under his contract, possession of it requested the defendant to have the heater and radiator removed, who thereupon directed the plaintiff to remove and place them in their permanent position in the building. There is also some testimony tending to show that the contractor furnished plaintiff hoisting tackle to accomplish the removal, and also gave some directions in respect to the same, from which it may be inferred that he waived his exclusive right to the possession of the house in so far as to permit the placing of the heater and radiators therein. There was testimony that "the heater was set up in its permanent position where it was to go. It was placed on a permanent brick foundation." "The heater was set plumb with the building, and made ready to receive the pipe. The radiators were taken to their various rooms where they were to be used." There is evidence that all this was done under the order of the defendant.

It is true there was countervailing evidence, still we cannot say there was no such evidence adduced as justified the submission by the court of the issue of fact to the jury.

II. The decisive issue of fact in the case arising on the pleadings was very fairly submitted to the jury under the instructions. The court told the jury in the plainest terms that if the heater and radiator mentioned in the contract were delivered on the defendant's premises before his house was destroyed by fire, and had been ordered to be so delivered by defendant, that the plaintiff was entitled to recover the second installment of $400. And, upon its own motion, further told the jury that "if the heater and radiators were upon defendant's premises when ready for use in construct-

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ing the heating apparatus, and his house was ready for such construction of said apparatus, and defendant ordered any portion of the material of heater and radiators to be used in such construction, then said heater and radiators were delivered within the meaning of the contract between the parties, and the installment or $400 became due and payable."

The defendant asked the court to inform the jury as follows: "2. The jury are instructed that the plaintiff admits that at the time the heater and radiators in question arrived in St. Joseph, and were taken to the defendant's house, that they had not been ordered to be delivered by defendant, and that defendant took them to said house and stored them therein for the benefit and accommodation of plaintiff; and, unless the jury believed from the evidence that the defendant afterwards consented to receive, *or treated as having been delivered*, said heater and radiators for the purposes for which they were ordered, they will find for the defendant."

"If they believe from the evidence that the heater and radiator had, at the request of plaintiff and without being ordered by defendant, been taken to defendant's premises to be stored for the benefit and accommodation of plaintiff before the signing of the contract read in evidence, then it was necessary under said contract, before the sum of $400 could become due, that the said heater and radiators should thereafter be ordered by defendant to be delivered, or that the same should be in some way used with defendant's consent for his benefit."

These last two instructions were given substantially as prayed, the *italicized* words in the first indicate the extent of its modification by the court. The jury found that the heater and radiators had been taken to defendant's premises to be stored for the benefit and accom-

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modation of plaintiff before signing the contract, and that thereafter the defendant ordered said heater and radiators to be delivered, or consented to receive, or treated the same as having been received. While the words, "treated as having been delivered," as employed in the court's instruction, are such as to furnish some ground of criticism, still we think all that the court meant to tell the jury was that if they found that the defendant caused, by his direction, the heater and radiators to be placed in position in the house for subsequent use therein that they might infer from this fact that there had been a delivery, and, no doubt, that was the understanding of the jury. When the instructions are taken in their entirety, as they must be, it will be seen that all the issues in the case were submitted to the jury. It is undeniably true that the instructions contain a number of verbal inaccuracies but they are sufficiently comprehensive in their hypotheses of facts to embrace all the issues, under the pleadings and evidence, which the jury were authorized to consider. Nothing is perceived in the instructions which could have led the mind of the jury away from the consideration of the issues they were required to determine from the evidence. There are no such inconsistencies or contradictions in them as were calculated to in any way prejudice the defendant.

III. The defendant makes the final point that the trial court further erred in telling the jury in plaintiff's third instruction that "it is of no consequence in this case whether plaintiff, in executing the written contract in suit, was acting for himself, or as agent for the Detroit Heating & Lighting Company. The plaintiff having executed the contract in his own name can maintain this action upon it."

The rule announced in the instruction is correct. It is so at common law. The general rule is, that where

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a contract is in terms made with the agent personally he may be sued on it. And this rule applies, although the fact of the agency and the name of the principal are known. Mechem on Agency, sec. 755; Story on Agency, sec. 393, *et seq.; Snider v. Express Co.,* 77 Mo. 523; *Keown v. Vogel,* 25 Mo. App. 35.

But, independently of the common law, the plaintiff could maintain this action. It is provided by our code, as follows: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." R. S. 1889, sec. 1991. This statute was enacted in 1855, appearing for the first time in the revision of that year. R. S. 1855, sec. 2, p. 1217. It is a substantial and almost literal copy of the statute of New York. Code of Civil Procedure of the State of New York, sec. 449. In 1860, this provision of the New York code came up for construction in the court of appeals in that state, and it was held that said provision embraced not only formal trusts declared by deed *inter partes,* but all cases in which a person in behalf of a third party enters into a written express contract with another, either in his individual name, without description, or in his own name, expressly in trust for or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared. It includes not only a person with whom, but one in whose name, a contract is made for the benefit of another. The contracts set out in the complaint are within its terms. *Considerand v. Brisbane,* 22 N. Y. 389–396. This case was afterwards followed, and the construction placed upon the statute

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applied by the supreme court of the United States in *Albany, etc., Iron & Steel Co. v. Lundberg*, 121 U. S. 451. And a like construction was placed on the above quoted provision of our statute in *Snider v. Express Co., supra.* It would, therefore, seem that the plaintiff can maintain his action either under the statute or the common law.

Perceiving no error in the record calling for our interference, the judgment must be affirmed. All concur.

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JAMES BAKER, Appellant, *v.* W. T. McINTURFF, Respondent.

St. Louis Court of Appeals, May 3, 1892.

1. **Crops Raised by Trespasser:** LANDLORD AND TENANT. When an intruder upon land plants crops thereon, such crops, so long as they remain unsevered, are regarded as the property of the landowner. This rule is applied in this cause against a tenant, who wrongfully retained possession of the premises let to him after his term had expired.

2. **Annual Crops:** REPLEVIN. Crops raised by yearly labor and cultivation are chattels, and may be recovered by replevin.

3. **Admission of Evidence not Covered by Pleadings:** SUFFICIENCY OF OBJECTION. *Semble,* that an objection to the admissibility of evidence on the ground of the irrelevancy of the evidence covers the ground that the evidence is not admissible under the pleadings.

4. **Estoppel in Pais:** SUFFICIENCY OF EVIDENCE. The evidence in this cause is considered and *held* insufficient to establish an estoppel *in pais.*

Appeal from the Greene Circuit Court. HON. T. J. DELANEY, Judge.

REVERSED AND REMANDED.

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Haseltine Bros., for appellant.

James W. Silsby and *C. V. Buckley*, for respondent.

BIGGS, J.—It is the well-settled law of this state that, where an intruder upon land plants crops thereon, such crops, so long as they remain unsevered, are regarded as the property of the land-owner. *Salmon v. Fewell*, 17 Mo. App. 118; *Adams v. Leip*, 71 Mo. 597; *Oyster v. Oyster*, 32 Mo. App. 270; *McAllister v. Lawler*, 32 Mo. App. 91. It is also the law that annual crops, crops raised by yearly labor and cultivation, are chattels, and are the subject of replevin. *Garth v. Caldwell*, 72 Mo. 622.

The present action is replevin for a crop of corn, grown upon a farm belonging to the plaintiff. The suit was begun in the circuit court on the fourth day of October, 1889, and at the time of the institution of the suit the corn was uncut and ungathered. The sheriff took possession of the corn under the writ of replevin and gathered and delivered it to the plaintiff. The defendant's answer was a general denial, and a plea in bar to the effect that the plaintiff's right to the corn (if he had any) had been previously adjudicated in an action brought by the plaintiff against the defendant for the possession of the premises under the landlord and tenant's act. The plea of former adjudication seems to have been abandoned at the trial, and it, therefore, needs no further mention by us. The trial resulted in a verdict and judgment for the defendant. The plaintiff has appealed.

At the close of the evidence the plaintiff asked the court to instruct the jury that, under the pleadings and evidence, the finding should be for the plaintiff. This the court refused to do. Other instructions were given

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and refused of which the plaintiff complains, and other matters of exception are assigned for error in this court, but, under the views which we entertain in reference to the case, we need only discuss the court's action in respect of the one instruction.

It was an undisputed fact on the trial that the farm, upon which the corn was grown, belonged to the plaintiff, and had been his property for several years. The defendant admitted that he was in possession of the corn at the time the suit was brought, but he denied that the plaintiff had any interest therein. It was also conceded by the defendant that he rented the farm from the plaintiff for the previous year, his term ending March 1, 1889, and that he continued in the possession of the premises thereafter under no agreement with the plaintiff for a new letting, but by virtue of a contract of renting with one Swanson. The defendant undertook to justify his attornment to Swanson under an alleged contract of sale of the farm in question from plaintiff to Swanson, but the evidence entirely failed to support the proposition, and this defense seems also to have been abandoned by the defendant. It appeared from the evidence that Swanson presented to the defendant such a written contract signed by one Dann, who professed to be acting as the plaintiff's agent, but the other evidence failed to show that Dann had written authority from the plaintiff to make the sale. On the contrary the plaintiff testified that Dann had no such authority, either written or verbal.

The only defense presented by the defendant's instructions was predicated on a state of facts which was supposed to be sufficient to estop the plaintiff from taking advantage of the want of authority on the part of Dann to make the sale. The defendant's instructions read: "1. The jury are instructed that, to constitute an estoppel, it is not necessary that this plaintiff,

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James Baker, designed to mislead the defendant; it is enough if the acts, if any, and declarations, if any, of said plaintiff, were calculated to, and did, in fact, mislead the defendant to his injury, while acting in good faith and with reasonable diligence.

"2. The court further instructs the jury that, when a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as to change his previous condition, the person inducing such belief will be estopped from afterwards denying the existence of such state of things, to the prejudice of the person acting."

The evidence upon which the foregoing instructions were based pertained to the actions and representations of Dann, to the effect that he was the agent of the plaintiff to make the sale; that the defendant acted on such representations, and rented from Swanson; and, also, the conduct of the plaintiff concerning Dann's employment. The evidence was objected to by the plaintiff, for the reasons that it was irrelevant, incompetent and immaterial, and that the defendant had failed to show any valid authority from the plaintiff to Dann to bind him in a contract of purchase. In a motion for a new trial, the additional objection was urged that no estoppel was pleaded by the defendant, and, therefore, the evidence was inadmissible for that reason also. If this last objection had been specifically made in the first instance, the action of the court would undoubtedly have been erroneous. Whether the objections which were actually made were sufficient to put the court in the wrong, presents a more difficult question. We are inclined, however, to the opinion that the objection to the admission of evidence for irrelevancy covers the question of its admissibility under the pleadings. Evidence offered in support of issues not

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made by the pleadings is certainly irrelevant and immaterial. But, if this question were decided for the defendant, his judgment would have to be set aside; because, in our opinion, the evidence was insufficient to establish an estoppel, and, therefore, the court committed error in submitting the question to the jury.

It is one of the elements of an estoppel *in pais* that the act complained of, by which the party is sought to be estopped, must have been done with the intention that the other party should act upon it, and that the other party was induced thereby to act to his prejudice. *Burke v. Adams*, 80 Mo. 504. Bigelow states the general principle in this way, as applicable to estoppels *in pais* by conduct: "The next requirement to this estoppel is that the representation must have been made with the intention, either actually or reasonably to be inferred by the person to whom it was made, that it should be acted upon. In general, where there is nothing reasonably indicating that the representation was intended to be acted upon as a statement of the truth, or that it was tantamount to a promise or agreement that the declaration made is true, so as to amount to an undertaking to respond in case of its falsity, the party making it is not estopped from proving the truth." Bigelow on Estoppel [5 Ed.] 628. It is another well-settled principle that, to constitute such an estoppel, the party urging it must have acted to his prejudice by reason of the act or conduct complained of. Keeping in view these general principles, let us examine the evidence. The plaintiff's evidence touching the question tended to prove that, in February, 1889, the defendant asked the plaintiff to renew his contract of renting for another year; that the plaintiff declined to do this, giving as a reason that he was about to sell or trade the farm, but did not say to whom he expected to sell it; that he asked the defendant to

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remain on the farm until the fifteenth of March; that nothing more was said or done until the latter part of March, at which time Swanson exhibited to the defendant a written contract for the sale of the farm to Swanson, signed by Dann, as agent, and that the defendant, thereupon, without waiting to see the plaintiff or his agent, rented the premises from Swanson for the ensuing year. There was, also, evidence tending to show that the plaintiff gave Dann verbal directions to make the trade with Swanson if he saw proper; but this was not communicated to the defendant by the plaintiff, or by anyone else, to his knowledge. In fact, the record does not show that the defendant was advised of this at all. On the other hand, the plaintiff denied that he gave Dann any authority to sell the property to Swanson, and his evidence shows that he was at his home, in the state of Illinois, when the written contract was signed by Dann; that he repudiated the contract as soon as he was advised of it; and that he did not know that the defendant had rented the farm from Swanson until in July or August, and that he supposed that his agents had rented the place to another tenant.

It needs no argument from us to show that this evidence failed to make out a case of estoppel. It did not establish a single element of an estoppel *in pais*. Upon what tenable ground is there to base an argument, that by reason of the plaintiff's conduct, or by reason of anything said or done by him, it would be a positive fraud against the defendant to permit the plaintiff to prove that Dann had no authority to make the sale, or to deny that he was in any way bound by the conduct of Dann or Swanson? The plaintiff had said nothing to the defendant about Dann being his agent to sell the farm, or that he was about to sell it to Swanson, nor was his conduct such as to lead the defendant to believe either fact. The long and short

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of the matter is, that the defendant illegally attorned to Swanson, and is now seeking in this action to escape the consequences of his unlawful act. Therefore, we conclude that, under the present record, the defendant was without a defense to the action, and that the plaintiff was entitled to a judgment.

With the concurrence of the other judges, the judgment of the circuit court will be reversed and the cause remanded. It is so ordered.

THE STATE *ex rel.* PURDY FOWLER, Respondent, v. W. W. CHANEY *et al.*, Appellants.

St. Louis Court of Appeals, May 3, 1892.

1. **Practice, Appellate:** EVIDENCE OF FILING OF BILL OF EXCEPTIONS. The mere recital by the clerk in the transcript that a bill of exceptions was filed is not sufficient evidence of the filing of the bill, when the transcript shows no record entry to that effect, and the bill itself does not contain a file mark.

2. ———: MATTER OF RECORD. When judgment is rendered in the trial court upon motion, and the judgment entry clearly shows the nature of the motion, the action of that court in rendering the judgment may be reviewed as matter of error as distinguished from matter of exception.

3. **Reversal of Judgment on Appeal:** JUDGMENT IN TRIAL COURT WITHOUT RETRIAL OF CAUSE. When an appellate court simply reverses the judgment appealed from and remands the cause, the entry of judgment in the trial court without a retrial of the cause is not warranted, unless legal propositions only are involved, and they depend solely upon conceded or written evidence, the legal effect of which was determined by the appellate court.

4. **Justices' Courts:** CONSTABLES: ALLOWANCE OF PENAL INTEREST FOR WRONGFUL RELEASE OF LEVY. Penal interest is not allowable under sections 3029 and 3032 of the Revised Statutes of 1879 for the wrongful release by a constable of property levied upon by him. Whether it is allowable for such release under the amendment of section 3029 in the revision of 1889 (R. S. 1889, sec. 6317) is not determined.

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Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

REVERSED AND REMANDED.

Wm. O. Mead and *Henry C. Young*, for appellants.

(1) Plaintiff's motion for judgment should not have been sustained. *Lampert v. Gaslight Co.*, 14 Mo. App. 376; *State v. Newkirk*, 49 Mo. 472; *Hurck v. Erskine*, 50 Mo. 116; *Amonett v. Montague*, 63 Mo. 201; *Barclay v. Bates*, 2 Mo. App. 139; *State ex rel. v. Circuit Court*, 41 Mo. 574; *Kinealy v. Macklin*, 67 Mo. 95; *Gamble v. Gibson*, 83 Mo. 290; *Chouteau v. Allen*, 74 Mo. 56. Where a case has been reversed and remanded without specific instructions from the appellate to the lower court, the case should be tried anew. (2) The judgment was excessive. The statute under which this writ was instituted does not authorize the recovery of damages at the rate of one hundred per cent. per annum for a surrender of property levied on under execution. 1 R. S. 1879, sec. 3029; *Miller v. Wall*, 27 Mo. 440.

Heffernan & Buckley and *C. S. Essex*, for respondent.

(1) The record nowhere shows the filing of the bill of exceptions, and there is nothing before the court but the record proper. No error being apparent, the judgment of the circuit court will be affirmed. *Jones v. Christian*, 24 Mo. App. 540; *Taylor v. Scott*, 26 Mo. App. 249; *Williams v. Williams*, 26 Mo. App. 408. (2) The decision of the Kansas City Court of Appeals was, and is, *res adjudicata*, and the circuit court could not retry the cause (*Armstrong v. City of St. Louis*, 69 Mo. 309), and it is conclusive of every matter within the

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terms of the issues made by the pleadings, and everything that might have been litigated. *Mason v. Summers*, 24 Mo. App. 174; 1 Herman on Estopped & Res Adjudicata, secs. 230, 115–118, 285, 352, 453, 625; *Zinc Co. v. Ins. Co.*, 41 Mo. App. 406, *loc. cit.* 414, and authorities cited. And it was the proper practice to move the court for judgment in conformity with the opinion and mandate of the Kansas City Court of Appeals, such being the only judgment the court could enter properly. *Gamble v. Gibson*, 10 Mo. App. 327, affirmed 83 Mo. 290; *Chouteau v. Allen*, 74 Mo. 56; *Connor v. Pope*, 23 Mo. App. 344; *Treadway v. Johnson*, 39 Mo. App. 176. And it was proper for the court to enter into inquiry of damages, or take such "further action as should be necessary to carry into effect what had already been decided." *Gamble v. Gibson, supra.* (3) The measure of damages is the loss sustained by relator occasioned by the constable's default, with one hundred per cent. per annum interest thereon from the time the money ought to have been paid over. R. S. 1879, secs. 3029, 3032, 3034, 3036, 3037; R. S. 1889, secs. 6317, 6320, 6322, 6324, 6325; *State ex rel. v. Miller*, 48 Mo. 251; *State ex rel. v. Langdon*, 57 Mo. 350, cited and followed in *State ex rel. v. Langdon*, 57 Mo. *loc. cit.* 356.

BIGGS, J.—In 1886, the defendant Chaney was a constable in Hickory county, where this suit originated. The present action is on his official bond, the conditions of which the relator charges he violated by wrongfully releasing certain personal property, which had been seized by him in an attachment suit before a justice of the peace, in which suit the relator was plaintiff and one Barney Pitts, defendant. Chaney admitted that he had attached a lot of cattle as the property of

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Pitts; that the attachment had been sustained and judgment by default entered against Pitts; that a special execution was issued against the attached property, and that while he so held the property he released nineteen head of cattle from the levy under the execution and delivered them to Mrs. Emily Pitts, the wife of Barney Pitts, He undertook to justify the release upon the ground that Pitts was a resident of the state of Missouri and was the head of a family, that he had absconded from the state at the date of the attachment, and that his wife had claimed the property as exempt. On a trial in the circuit court of Hickory county there was a judgment for the defendants, but, on appeal to the Kansas City Court of Appeals, the judgment was reversed and the cause remanded. *State ex rel. v. Chaney*, 36 Mo. App. 513. Afterwards, there was a change of venue to the circuit court of Greene county, where the relator took the position that, under the decision of the Kansas City Court of Appeals, the circuit court must enter a judgment for the penalty of the bond, and that the only matter left in dispute was the amount of the damages, all other questions both of law and fact having been conclusively adjudicated and settled adversely to the defendants. The court, being of this opinion, entered a judgment on the relator's motion for the penalty of the bond and directed an inquiry of damages. Neither party requiring a jury, the inquiry was had before the court, in which the court found that the relator had been damaged in the sum of $112; and, thereupon, the court ordered that execution issue for that amount, together with interest thereon at the rate of one hundred per cent. per annum from the return day of the execution in the attachment suit, which amounted in the aggregate, as ascertained by the court, to the sum of $500. From that judgment the defendants have appealed to this court.

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There is no sufficient evidence in the transcript of the filing of what purports to be a bill of exceptions. There is a recital by the clerk, who made the transcript, that the bill of exceptions was filed in the office of the clerk of the circuit court, but the transcript shows no record entry to that effect, neither does the bill itself contain a file-mark. The mere recital by the clerk in the transcript that the bill was filed is not sufficient. We must, therefore, dispose of this case on the record proper.

Where the judgment entry clearly shows, as it does in this case, the nature of the motion, the court's action thereon may be reviewed as a matter of error as contradistinguished from matter of exception. The question then is, whether the court committed error in sustaining the relator's motion for judgment without giving the defendant an opportunity to retry the cause. The statute makes it the duty of an appellate court to "award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them as shall seem agreeable to law." R. S. 1889, sec. 2304. Where a cause is remanded with special directions for a certain judgment, as is often done instead of making judgment in the appellate court, there is nothing for a trial court to do but to follow the directions. The mandate is a sufficient warrant for its judgment. *Chouteau v. Allen*, 74 Mo. 56; *Shroyer v. Nickell*, 67 Mo. 589; *Hurck v. Erskine*, 50 Mo. 116. But not so where there has been a simple reversal and remanding, unless legal propositions *only* are involved which depend solely upon conceded or written evidence, the legal effect of which the court construed on the first appeal. *Treadway v. Johnson*, 39 Mo. App. 176. In such a case there would be nothing for the trial court to retry, and its duty would be to enter judgment in conformity with the

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opinion of the superior court. It is only in such cases that appellate courts direct judgment to be entered. But we have no such case here. The Kansas City Court of Appeals simply reversed the judgment and remanded the cause. That court only decided that, upon the record as presented to it, it appeared that Pitts was a non-resident of the state of Missouri, and that, as he was not entitled to exemptions, his wife could not claim them.

The decision exclusively settled the point, that upon the facts as presented by *that record, Pitts was a non-resident of the state* at the date of the issuance of the attachment writ, and that, this being true, Mrs. Pitts was not entitled to her exemptions; but it did not conclusively settle the fact that Pitts was *actually* a non-resident. The conclusion of the court on this question of facts seems to have been based on the assumption that non-residency was the only ground for the attachment, and, the attachment being sustained, both Pitts and his wife were concluded by the finding; whereas the amended petition, which has been filed since the case was remanded, states that another ground for the attachment was that Pitts was about to remove his property and effects out of the state with intent to hinder, delay and defraud his creditors. This pleading tendered a new issue, which on a retrial made it competent for the defendant Chaney, in order to justify his action in releasing the cattle, to introduce evidence to show, if it was a fact, that the attachment was sustained on the other ground, and that Pitts *was* a resident of the state of Missouri at the date of the attachment, but had absconded or had absented himself therefrom, leaving his wife behind. R. S. 1889, sec. 4908; *Griffith v. Bailey*, 79 Mo. 472; *Steele v. Leonori*, 28 Mo. App. 675. It must be borne in mind that the removal of property from the state with the

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intention only to hinder creditors, and not with the intention to change domicile, does not deprive the owner of his exemptions. Our conclusion is that the court committed error in sustaining the relator's motion for judgment, and for the error in so doing the judgment will have to be reversed. It may be proper to state that the defendants' answer only states inferentially that Pitts, at the date of the attachment, was a resident of the state of Missouri. In this respect the answer ought to be amended.

There is error upon the face of the record for another reason. The statute (R. S. 1879, sec. 3029) authorizes summary proceedings before a justice of the peace against a constable and his securities in the following cases: "*First*, if the constable fail to make a return of the execution according to the command thereof; *second*, if he make a false return; *third*, if he fail to have any money by him collected on execution, before the justice on the return day thereof, ready to be paid over to the persons entitled thereto, or have the receipts of such persons therefor; *fourth*, if he fail to pay over, upon the demand of the person entitled thereto, or his agent, any money received by him in payment of any judgment, or upon any bond, note, account or other demand placed in his hands for collection, and for which he shall have given his receipt, or any money or property received by him in pursuance of any of the provisions of this article." On the trial of such a proceeding section 3032, Revised Statutes, 1879, provides that, "if it appear that the finding should be for the plaintiff, the justice shall render judgment against such defendant or defendants for the amount ascertained to be due on the complaint, together with interest thereon, at the rate of one hundred per cent. per annum, from the time such execution ought to have been returned, or from the

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time such money ought to have been had before the justice, ready to be paid over to the parties entitled thereto," etc. For the cause mentioned the injured party may proceed against the constable and his sureties before a justice of the peace, or he may enforce his remedy on the official bond. *Rose v. Cobb*, 64 Mo. 464; *Ransom v. Cobb*, 67 Mo. 375.

We are of the opinion that the present case, which is one for the wrongful release of property from levy under execution, is outside of the classes of cases mentioned in section 3029, and, therefore, the defendants are liable (if at all) for the actual damage sustained, with legal interest thereon from the return day of the execution. It was said by Judge RICHARDSON in construing this section in the case of *Miller v. Wall*, 27 Mo. 441: "The twenty-third (3029) section was designed to give a simple and speedy remedy to the plaintiff in a justice's execution, or any person who has placed a bond, note or account in the hands of a constable for collection, and the twenty-eighth section applies to persons who are interested in fees to be collected by a constable on execution; but neither section indicates any remedy for the defendant in an execution who may be injured by any unlawful act or omissions of a constable." The case of *State ex rel. v. Langdon*, 57 Mo. 350, was an action on a constable's bond for failing to return an execution. It was held that the constable was liable for interest on the sum actually received by him under the execution at the rate of one hundred per cent. per annum. That case was clearly within the statute. But in the case of *State ex rel. v. Langdon*, 57 Mo. 353, the complaint was that attached property had been wrongfully released by the constable. It was there held that the measure of damages was the value of the property released. In the revision of 1889 (sec. 6317), section 3029

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was amended. Whether the section, as it now stands, is broad enough in its terms to cover a case like we have here, it is not necessary for us to decide. The alleged breach of the bond on the part of the constable occurred, and the suit itself was instituted, prior to the revision of 1889. We conclude, therefore, that the judgment of the court was grossly excessive, and for this reason also it will have to be reversed.

With the concurrence of the other judges, the judgment of the circuit court will be reversed and the cause remanded. It is so ordered.

DANIEL LEAHY *et al.*, Appellants, v. JOHN T. DAVIS *et al.*, Respondents.

St. Louis Court of Appeals, May 3, 1892.

Jurisdiction of Appeals: AMOUNT INVOLVED. When the judgment in an action for $5,000 as damages (in this cause the action was for the death of a minor child) is only for $175, and the evidence does not show conclusively that the amount of the damages in any event must be within the jurisdiction of this court, the supreme court has jurisdiction of an appeal by the plaintiff.

Appeal from the St. Louis County Circuit Court.—HON. W. W. EDWARDS, Judge.

TRANSFERRED TO THE SUPREME COURT.

BIGGS, J.—In this action the plaintiffs claim that the death of their minor child was brought about by the negligence of the defendants. Damages were claimed in the sum of $5,000. There was a trial and judgment for the plaintiffs for $175. The plaintiffs have appealed, and complain that under the evidence the verdict and judgment are grossly inadequate.

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We are of the opinion that we have no jurisdiction of this appeal. *Prima facie,* the jurisdiction is with the supreme court, and, as the evidence does not show conclusively that the amount of damages in any event must be within the jurisdiction of this court, the cause will have to be transferred to the supreme court. The order of transfer will, therefore, be made. All the judges concur.

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I. W. HILL, Appellant, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

St. Louis Court of Appeals, May 3, 1892.

1. **Railroads:** KILLING STOCK: COMMON-LAW RIGHT OF ACTION. The statute for the recovery of single damages against railroad companies for the killing of stock (R. S. 1889, sec. 4428) does not provide for an exclusive remedy, but is cumulative and does not displace the common law in the situation to which it applies.

2. ———: ———: RECOVERY UNDER GENERAL ALLEGATION OF NEGLIGENCE. *Held, arguendo,* that, under a general allegation of negligence on the part of a railway company in an action against it for single damages for the killing of stock, the plaintiff may succeed either by proving negligence at common law, or by proving the constructive statutory negligence in failing to erect and maintain fences at a requisite place.

3. ———: ———: PLEADING: DETERMINATION OF CHARACTER OF ACTION. To determine whether a petition states a statutory or common-law cause of action for the killing of stock by a railway company, it is necessary to consider whether, in order to recover under the petition, the plaintiff must prove the kind of negligence named in the statute, that is, the failure on the part of the railway company to erect and maintain a lawful fence, or whether he can succeed by proving what would be negligence at common law.

4. ———: NEGLIGENCE: PLEADING. It is a good and sufficient pleading of negligence at common law on the part of a railway company to set out and describe the acts done with a reasonable degree of particularity, and then allege that they were negligently done.

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5. ———: ———: ———. Negligence in fact may consist of any number of negligent acts preceding the injury and leading up to it and contributing to it. In stating a cause of action therefor, the plaintiff is not obliged to select one of these acts and rely upon it. And *held* in this action, which was one for the killing of stock by a railway train, the petition, which alleged in one count a number of negligent acts on the part of the railway company conducing to the injury complained of, stated but a single cause of action.

6. ———: KILLING STOCK: NEGLIGENCE IN FAILING TO DISCOVER SAME. In running its trains at places where its tracks are not fenced, and where animals are liable to stray upon its tracks, a railway company is under the duty of keeping a reasonable lookout for such animals. Accordingly, when stock thus straying upon its tracks is killed by one of its trains, the railway company is responsible therefor, if its employes could, by the exercise of reasonable care, have discovered the stock in time to have avoided injury thereto.

Appeal from the Franklin Circuit Court.—HON. RUDOLPH HIRZEL, Judge.

REVERSED AND REMANDED *(and certified to the supreme court).*

John W. Booth, for appellant.

T. B. Crews, W. S. Shirk and *H. S. Priest* for respondent.

THOMPSON, J.—This action was brought on the sixteenth of October, 1891, to recover damages for killing certain horses belonging to the plaintiff. The court sustained a demurrer to the petition; the plaintiff elected to stand on his petition; thereupon the court rendered judgment for the defendant, to reverse which the plaintiff prosecutes this appeal. The petition was as follows:

"Plaintiff, I. W. Hill, complaining of the defendant, the Missouri Pacific Railway Company, states that said defendant is, and at all times hereinafter mentioned was, a railroad corporation duly organized and existing under the laws of the state of Missouri by the corporate name of the Missouri Pacific Railway Company.

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"That, on the eighth day of November, 1889, and for many years theretofore, said defendant owned and operated a railroad in the state of Missouri, known as the Missouri Pacific railroad, in part located within the corporate limits of the city of Pacific, in the county of Franklin and state of Missouri, and thence extending westward through the county of Franklin; and the said railroad, where the same crosses the west boundary line of said city, was inclosed by fences along and on the right of way of defendant, on which right of way said railroad was located; and, for a considerable distance from said boundary line into and within the corporate limits of said city, said railroad was, in like manner, inclosed by fences on and along said right of way.

"That at the place where, in said town, the said road was so fenced during all said time the lands adjoining the said railroad and the right of way thereof, on the south side of said right of way, were used for farming purposes, through which on the south side of said railroad a narrow lane ran up to the line of the right of way of said railroad; and, at the point where said line terminated on the south side of said right of way, a gate, forming a portion of said railroad fence, opened into and upon the right of way of said railroad, through which, when open, horses and other domestic animals could pass from said lane into and upon said railroad and right of way, and being on said railroad and right of way, could not escape therefrom, except by returning through said gate or passing over defendant's said fences and cattle-guards connected therewith.

"That defendant was not required by law to maintain said fences or gate at said point, but maintained the same of its own volition; and so maintaining the same it was the duty of defendant to keep said fences and gate in such condition and so connected with cattle-guards as to prevent horses and other domestic

animals from getting on said road between said fences. That, by reason of the maintenance of said fences at said place, horses and other domestic animals, being on said railroad between said fences, had less chance to escape from being injured by defendant's engines and trains than they would have had if, being on said railroad at said point, said fences had not existed to interfere with their escape from said railroad and right of way onto said adjoining lands; and, therefore, it was the duty of defendant, while it maintained said fences and gate, to use more than ordinary care to keep the same in such condition as to prevent horses and other domestic animals from getting on said railroad through said gate and fences; yet said defendant, on said day and for many years theretofore, maintained said fences and said gate in said fence on said south side of said railroad in a careless and negligent manner, and repeatedly suffered said gate to stand open and unfastened, and to be without suitable latches and fastenings to hold the same closed. That during all said time said gate had thereon insufficient fastenings, that it would open by natural causes independent of being opened by any person, and by reason of its proximity to said city said gate was peculiarly subject to being left open by persons passing either from said adjoining lands to said railroad, or from said railroad to said adjoining lands, through said gate; and during all of said time said gate was often left open and unfastened, so that horses and other domestic animals could, by passing through the same, get on said railroad; and on said day and during all said time defendant had notice of said facts.

"That the maintenance of said gate at said place, as the same was so maintained by defendant, was negligence on the part of defendant, liable to occasion injuries of the character of the injury hereinafter complained of.

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"That, on the eighth day of November, 1889, by reason of said negligence of defendant, three horses, the property of plaintiff and of the value of $500, then lawfully running at large on the south side of said railroad, passed through said lane, and, the said gate not then being securely fastened, passed through said gate and so got upon said railroad at a point within the corporate limits of said city; and, having so gotten upon said railroad and being on said railroad between said fences, were frightened by an engine and train of cars then and there being run and operated on said railroad, and ran before said engine and train of cars along said railroad until they were caught, struck and killed on said railroad, in said county of Franklin, by defendant, by its said engine and train of cars, on said eighth day of November, 1889.

"And plaintiff avers that defendant, by its agents and employes, then and there running said engine and train of cars, by the exercise of reasonable care could have seen the said horses and have stopped the said engine and train of cars before overtaking or striking any of said horses, but did carelessly and negligently then and there run said engine and train of cars upon said horses, and kill the same.

"And defendant having so negligently maintained said gate in said fence, in manner and form as aforesaid, for many years and until the injury aforesaid was done to plaintiff, did within a few days thereafter close up and stop said gate by making a permanent fence along and across the same, as before the killing of plaintiff's said horses it might lawfully have done, and ever since that time defendant has maintained said fence across said gate. And plaintiff avers that, by killing his said horses in manner and form as aforesaid, defendant has damaged plaintiff in the sum of $500, for which said sum with costs plaintiff asks judgment."

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The grounds of the demurrer were thus stated:

"*First.* Said petition does not state facts sufficient to constitute a cause of action.

"*Second.* Said petition alleges two separate and distinct causes of action, both united and intermingled in the same count, the first, for negligently building and failing properly to maintain a certain fence along defendant's railroad, whereby plaintiff's horses were enabled to get upon said right of way, and were killed by defendant's engine and cars, and the second being for negligence on the part of the agents and servants of defendant in failing to see said horses and negligently running its engine and cars upon said horses, the first cause of action definitely alleging the negligence of the defendant itself, and the second alleging the negligence of the servants of the defendant."

In support of this demurrer the position of the defendant is twofold: *First.* That the petition does not state an action at common law, but states an action under section 4428, of the Revised Statutes, which is the statute formerly known as section 5 of the damage act, or "the single damage act;" and, consequently, that on its face it is barred by the statute of limitations of one year, contained in section 4429 of the damage act, and that this may be reached by demurrer. *Second.* That it involves a misjoinder of two distinct causes of action.

I. The question whether the petition states only a cause of action under section 4428 of the Revised Statutes involves two inquiries: *First.* Whether that section is an *exclusive* remedy, and repeals any remedy under the common law, in the situation to which it applies, or whether it is *cumulative* merely, leaving also an action for damages under the rules of evidence existing at common law in the same situation. *Second.* If the statute is cumulative, whether the petition states

a cause of action, to prove which it is necessary to proceed under the statute.

As to the first of these propositions it is settled in this state that the statute is cumulative, and does not displace the common law in the situation to which it applies; so that, under a general allegation of negligence, the plaintiff may succeed either by proving negligence at common law, or by proving the constructive negligence of the statute in failing to erect and maintain fences in the given situation. Thus, in *Calvert v. Railroad*, 34 Mo. 243, the petition alleged, in general terms, that the defendants, "by their agents, servants, locomotives and railroad cars, negligently and carelessly ran over, maimed and killed certain cattle, belonging to plaintiff, to-wit, one cow of the value of $25, and one heifer of the value of $10, for which he asks judgment." It was objected by the defendant on appeal that this petition stated no cause of action; but the supreme court, speaking through DRYDEN, J., said: "The petition in this case contains a clear and concise statement of the facts, imposing a common-law liability upon the appellant for the alleged negligence of its agents. But this is not enough for the appellant, who insists that the petition is bad because it does not likewise aver the facts necessary to create a statutory liability, and for this cause moves in arrest of judgment. It is unjust to the public that the time of the courts should be occupied in the consideration of a question so utterly devoid of merit." On a subsequent trial, under the same petition, it was shown by evidence that the injury occurred at a place which was not a crossing of a public highway, and which was not inclosed by a lawful fence. The jury, under the instructions of the court, having found for the plaintiff, the defendant again appealed on the ground that the petition showed merely a common-law liability, and

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that no recovery could be had without proof of actual negligence; in other words, that a party seeking to recover under a statute must declare specially on the statute. The court overruled this contention (reaffirming its former decision on the particular point), and held that negligence might be established either by proof of negligent acts, or omissions resulting in the injury, or by proof of the constructive negligence created by section 5 of the damage act in the failure to erect a lawful fence. *Calvert v. Railroad*, 38 Mo. 467. The doctrine of this case was reaffirmed by the supreme court in *Iba v. Railroad*, 45 Mo. 469, in the most explicit terms. That was an action for killing the plaintiff's cow, brought before a justice of the peace, on a statement of a cause of action drawn in the most general terms as follows: "The Hannibal & St. Joseph Railroad Company, to Henry B. Iba, debtor, for damages amounting to $65, for a cow killed on railroad on or about the seventh day of November, 1867, $65." One of the errors assigned was that the court, in declarations of law, ruled that the plaintiff was entitled to single damages, notwithstanding that actual negligence, other than neglect to build a fence (the neglect stated in section 5 of the damage act), was not proved. This assignment of error raised for decision the question, whether this section of the damage act was exclusive, or whether it left the common-law principle in operation. In giving the opinion of the court Bliss, J., said, referring to the case just cited: "The action in that case was not brought for double damages, but the plaintiff relied upon section 5 of the chapter of damages; and the circuit court might have treated the case at bar as prosecuted under the same chapter, and, under the authority of *Calvert v. Railroad*, sustained the statement filed with the justice, though regarding it as in the nature of a common-law petition."

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But the case of *Iba v. Railroad* went a good deal further. The jury found in favor of the plaintiff for double damages. The circuit judge refused to render a judgment for double damages, but rendered a judgment for single damages only. This judgment was reversed in the district court, and the plaintiff appealed to the supreme court. In the supreme court the question was raised, not merely whether section 5 of the damage act was exclusive and repealed the remedy of the common law, but whether section 43 of the railroad act, the act giving double damages for failure to fence, had such an effect. The court held that it did not. In giving the opinion of the court on this point BLISS, J., also said: "It may be claimed that when the statute has enacted a special liability the corporation is exonerated from any other. It is sometimes so. If there would be no general liability for neglect of the duty imposed, unless enacted by statute, then it could only be held for the statutory liability. But when the statute creates a special duty, for the neglect of which a common-law action would lie, that action is not forbidden by the fact merely that an extraordinary liability in the nature of a penalty is also provided. The latter is only cumulative. The liability for the greater shall not, of itself, exclude the liability for the less, provided the latter could exist without the former; nor shall the greater include the less, if the less is wholly dependent upon the greater. The statute under consideration imposes the obligation to fence. It dispenses with any other proof of negligence if the fence is not built, and it compensates the sufferer with double the loss. If nothing were said about damages the defendant would be liable for the actual loss; so, I imagine, he would be liable if nothing were said about the evidence. The obligation of itself creates the liability. The right to double compensation may be followed or abandoned. It neither

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creates nor supersedes the right. That would exist without it."

In *Minter v. Railroad*, 82 Mo. 128, it was held that a general statement filed before a justice of the peace, such as the following: "Hannibal and St. Joseph Railroad Company to John S. Minter, debtor, for killing three hogs," etc., might be amended in the circuit court by substituting a statement in the nature of a petition under section 5 of the damage act for failure of the railroad company to fence, etc., without introducing a new cause of action.

In *Boone v. Railroad*, 20 Mo. App. 232, the action was commenced before a justice of the peace, and the plaintiff's statement charged that "the defendant, by its agents and servants, carelessly and negligently, with its engine and cars, ran over and killed the plaintiff's cow," etc. Under this statement, the plaintiff, against the objection of the defendant, gave evidence tending to show that the point in question was where the defendant was required by law to erect and maintain a fence on the sides of its road, and that it had neglected to do so, On appeal it was held by the Kansas City Court of Appeals that this was not error. The court, following the case last previously cited, held in substance that, under a statement setting up a case of negligence at common law, the plaintiff could recover under evidence of the statutory constructive negligence, which consisted of failing to fence under section 5 of the damage act. There are analogous decisions of the supreme court, to the effect that, under a common-law statement or count for negligence in running the defendant's locomotive and cars, it is competent to prove any negligence that contributed to produce the injury complained of, including that of the failure to ring the bell or sound the whistle, which is made negligence by

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statute. *Goodwin v. Railroad*, 75 Mo. 73; *Braxton v. Railroad*, 77 Mo. 755. If, then, a plaintiff can, under an allegation of negligence at common law, make out a case by giving either evidence which would be evidence of negligence at common law, or evidence which is made presumptive evidence of negligence by section 5 of the damage act (R. S., sec. 4428), then it logically follows that the statute has not repealed the common law, but has furnished at most a cumulative remedy. Perhaps the best conception of the subject is that the statute has operated merely to introduce a new rule of evidence, in a particular case where the right is a common-law right; that, however, need not be discussed.

The next question is, whether the petition above set out is, in its proper interpretation, a petition under the statute, or a petition at common law. The statute is as follows: "When any animal or animals shall be killed or injured by the cars, locomotive or other carriages used by any railroad in this state, the owner of such animal or animals may recover the value thereof in an action against the company or corporation running such railroad, without any proof of negligence, unskilfulness or misconduct, on the part of the officers, servants or agents of such company; but this section shall not apply to any accident occurring on any portion of such road that may be inclosed by a lawful fence, or in the crossing of any public highway."

The most cursory glance at the petition will show that it was not only not intended to be a petition under the statute, but that it is not such in fact. In order to determine this question it is necessary to consider whether, in order to recover under the petition, the plaintiff *must* prove the kind of negligence named in statute; that is, the failure on the part of the defendant to erect and maintain a lawful fence, or whether he can

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succeed by proving what would be negligence at common law. It is plain that he can succeed by proving negligence at common law, and that he can neglect all that portion of his petition which speaks of the fence being erected but not being maintained, and commence with that portion where his horses were found upon the track, and where he alleges the fact that "defendant, by its agents and employes then and there running said engine and train of cars, by the exercise of reasonable care could have seen the said horses and have stopped the said engine and train of cars before overtaking or striking any of said horses, but did carelessly and negligently then and there run said engine and train of cars upon said horses, and killed the same," and yet sustain a recovery. That a petition alleging negligence in the terms last quoted (having of course the necessary preliminary matter of inducement) states a good cause of action at common law either for killing animals or human beings upon a railway track, is shown by the following decisions: *Schneider v. Railroad*, 75 Mo. 295; *Pope v. Railroad*, 99 Mo. 400; *LeMay v. Railroad*, 105 Mo. 361. The principle of these and other decisions in this state is, that it is a good and sufficient pleading to set out and describe the acts done with a reasonable degree of particularity, and then allege that they were negligently done. *Sullivan v. Railroad*, 97 Mo. 117. See also, as illustrating the principle: *Gurley v. Railroad*, 93 Mo. 445; *Johnson v. Railroad*, 96 Mo. 340. In *Schneider v. Railroad, supra*, the action was for damages for killing the plaintiff's horse, and the charging part of the petition was as follows: "Defendant so carelessly and negligently ran and managed its locomotive, engine and cars on its railroad as to run against and over said horse thereby killing him." This was held a good petition. So in *LeMay v. Railroad, supra*, the action was for damages for killing the plaintiff's

husband upon the defendant's railway track, and the essential allegations of the petition were that the deceased, "by the carelessness, negligence and unskilfulness of the defendant, its officers, agents, servants and employes, while running, conducting and managing certain cars, was run over by two cars of said defendant, and which cars were, at the time they ran over the said Frank LeMay, carelessly, negligently and unskilfully conducted and managed by said defendant, its officers, agents, servants and employes, and received injuries thereby, from which he instantly died." It was likewise held that this was a good petition.

It is argued that the petition fails to state a cause of action, in that it alleges that the defendant, "by its agents and employes then and there running said engine and train of cars, by the exercise of reasonable care *could have seen* the said horses, and have stopped the said engine and train of cars before overtaking or striking any of said horses, but did carelessly and negligently then and there run said engine and train of cars on said horses, and killed the same;" instead of averring that the defendant, by its agents and employes, *saw the horses* upon the track in time, by the exercise of reasonable care, to have stopped the engine and train of cars so as to avoid killing them. In support of this view of the measure of the defendant's liability, two decisions are cited of the Kansas City Court of Appeals: *Hoffman v. Railroad*, 24 Mo. App. 546; *Welch v. Railroad*, 20 Mo. App. 477. We do not regard these cases as having been well decided. We understand that the supreme court in *Kendig v. Railroad*, 79 Mo. 207, held precisely the reverse, qualifying and explaining its previous decision in *Wallace v. Railroad*, 74 Mo. 594. We, also, think that this conclusion is strongly supported by the analogues of the decisions of the supreme court of this state in regard to the killing or injuring

of adult persons upon railway tracks. The doctrine of that court in such cases is that where adult persons are *mere trespassers* upon the railway track, where they are upon the track at places where it is fenced and where they have no right to be, the company owes them no duty other than the duty of not wantonly injuring them, after discovering them in their exposed situation; it is not bound to look out for them, and its failure to do so is not negligence. *Barker v. Railroad*, 98 Mo. 50; *Rine v. Railroad*, 100 Mo. 228; *Shaw v. Railroad*, 104 Mo. 656. But, where the place is such that the servants of the railway company may and ought reasonably to anticipate that persons may lawfully be upon the track, as at a highway crossing or where the track is built upon a public highway or in a private coal yard intersected by railway tracks, and in other cases that might be supposed, then the rule is that the servants of the railway company are under a duty of *active vigilance*, and that, if by the exercise of ordinary care in the discharge of this duty they might have seen the killed or injured person on the track in time to have avoided killing or injuring him, and they nevertheless failed so to do, the company will be liable. *Harlan v. Railroad*, 65 Mo. 22; *Kelley v. Railroad*, 75 Mo. 138; *Dunkman v. Railroad*, 95 Mo. 244, citing numerous previous decisions of the court to the same effect; *Hilz v. Railroad*, 101 Mo. 54, citing cases.

In this state the owner of land is not bound to keep his domestic animals upon his premises or to fence them in, but they are allowed what is called a "free range," and he does not become a trespasser from the fact that they stray upon the unfenced lands of another proprietor. *Gorman v. Railroad*, 26 Mo. 441; *Davis v. Railroad*, 19 Mo. App. 425; *Hovenstein v. Railroad*, 55 Mo. 33; *Busby v. Railroad*, 81 Mo. 43; *Turner v. Railroad*, 78 Mo. 578, 581. Under the law of Missouri trespass

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is not committed by cattle straying upon uninclosed land. *Bradford v. Floyd*, 80 Mo. 207; *Heald v. Grier*, 12 Mo. App. 556. It seems, therefore, to follow, on principle, that a railroad company owes the duty, in running its trains at places where its track is not fenced and where animals are liable to stray upon its track, to keep a reasonable lookout with the view of discovering any animals that may so stray upon its track in time to prevent running over and killing or injuring them.

II. We now come to the second branch of this demurrer, which is that the petition involves a misjoinder, in one count, of two different causes of action. We do not so read the petition. It seems plain to us that the negligent killing of the plaintiff's horses is the one cause of action alleged therein, and that the act of the defendant's servants in allowing the gate to become open whereby the plaintiff's horses got upon the defendant's track, into a sort of pocket, so to speak, so that when pursued by an engine they would be restrained by the fences on either side from running off the track, and the further fact that the servants of the defendant, in driving the train which killed them, might have discovered them on the track in time to have prevented the accident, is merely the statement of two preceding acts or circumstances of negligence leading up to the single catastrophe. It is obvious that actual negligence may consist of any number of negligent acts preceding the injury or catastrophe, all of them naturally leading up to it and contributing to it, and it cannot be the law that the pleader, in stating his ground of action, is obliged to select one of these precedent acts of negligence, and rely upon that, when that alone may not be sufficient, but two or more, or all of them collectively, may be sufficient to make out his right of recovery.

Nor is the petition open to the criticism, that it

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proceeds upon the ground that, by fencing its track in the town of Franklin where it was not required by law to fence, and then in leaving the gate open, whereby it created a sort of pocket or horse-trap, so to speak, it attempts to state a separate ground of actionable negligence. It may be conceded that that alone would not constitute actionable negligence. For while, as just said, the owner of cattle and horses is not obliged to restrain them from running at large, and while they are not trespassers if they do run at large upon the unfenced lands of another, yet that other is not on his part to keep his lands in a position of safety to receive them. Thus, where a railroad company accidentally left upon its uninclosed grounds an uncovered well, and the plaintiff's cattle strayed into it and were drowned, the company was not liable for them. *Hughes v. Railroad*, 66 Mo. 325. We may take judicial notice of the well-known habits of animals, and may conclude that horses on a railway track, which is fenced in on either side, although at a short distance from the track, would be more apt to run along the track when pursued by an approaching train, than to run off the track, and that they would be less apt to leave the track than where the track was entirely unfenced and a way of escape clear. The decision of the Kansas City Court of Appeals in *Boggs v. Railroad*, 18 Mo. App. 274, presents a considerable analogy to the part of the plaintiff's petition which describes the "pocket" so called, in which the horses found themselves penned when they were killed, with the exception that in that case the plaintiff's mule, which was killed, sustained the injuries which killed him in endeavoring to jump the fence, which was a barbed wire fence. The court held that, although the company was not liable under the statute (the double damage act) by reason of the fact that the mule was not killed by an actual contact with defend-

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ant's engine or train, yet, under the facts of the case a common-law action for negligence might well be sustained for the omission to comply with a statutory duty. Without saying whether or not we should so hold if the same question were before us, we can see that where a railway company undertakes to maintain a fence and yet leaves a gate in the fence open, so that, when horses get inside the fence, they find themselves on its track and right of way in a sort of pocket, they are more apt to be injured upon the track than where their means of escape is not obstructed by a fence on either side, and, hence, that the servants of the company in running their trains at such a place may be under the duty of keeping a more vigilant watch and exercising greater care to avoid injuring animals upon the track than would rest upon them under other circumstances.

We are, therefore, of opinion that the learned judge erred in sustaining the demurrer to the petition; and we accordingly reverse the judgment of the circuit court, and remand the cause. But, as our decision is necessarily in conflict with the decisions of the Kansas City Court of Appeals above quoted (*Hoffman v. Railroad*, 24 Mo. App. 546, and *Welch v. Railroad*, 20 Mo. App. 477), the cause must be certified to the supreme court for final determination. It is so ordered. All the judges concur.

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SYLVANUS J. BUNKER *et al.*, Appellants, v. J. J. HIBLER, Garnishee of JOHN A. DYGERT, *et al.*, Respondents.

St. Louis Court of Appeals, May 3, 1892.

1. **Garnishment:** EFFECT OF ANSWER OF GARNISHEE. **The answer of the garnishee to the interrogatories exhibited in the garnishment proceeding is conclusive in his favor, unless it is overthrown by evidence on the part of the plaintiff.**

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2. ——: BURDEN OF PROOF: ACCOUNTING BY GARNISHEE AS AGENT OF THE PRINCIPAL DEFENDANT. *Held*, accordingly, that when the garnishee admitted in his answer a liability in a stated sum to the principal defendant, and the plaintiff, by his denial, alleged that the liability was greater, the burden of proving the truth of the latter allegation was on the plaintiff, though it appeared in evidence that the garnishee had, prior to the service of garnishment, received a greater sum as the agent of the principal defendant.

3. **Shifting of Burden of Proof:** DISTINGUISHED FROM SHIFTING OF WEIGHT OF EVIDENCE. *Held*, in the course of discussion, that the burden of proof never shifts during the trial so long as the evidence is directed to the same proposition of fact, and that a distinction is to be drawn in this respect between the shifting of the burden of proof, and the shifting of the weight or preponderance of the evidence.

4. **Practice, Appellate:** WEIGHING THE EVIDENCE IN ACTION AT LAW: CREDIBILITY OF WITNESSES. An appellate court has nothing to do with the credibility of witnesses in determining the sufficiency of the evidence to support the verdict in an action at law.

Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

AFFIRMED.

Lincoln & Lydy, for appellants.

The creditor acquires such rights against the garnishee as the debtor possessed at the date of the garnishment. *Weil v. Tyler*, 38 Mo. 545; *McPherson v. Railroad*, 6 Mo. 103, *loc. cit.* 110–111; *Fenton v. Block, Tyler & Co.*, 10 Mo. App. 536, *loc. cit.* 539; Drake on Attachments [5 Ed.] sec. 452, and cases cited. "The issue or issues [speaking of garnishment] shall be tried as ordinary issues between plaintiff and defendant." R. S., sec. 5234. The plaintiff must prove the indebtedness in the same manner as the defendant would be compelled to do, had he sued the garnishee. *Karnes v. Pritchard*, 36 Mo. 135. A debt proved to have existed is presumed to continue unless payment is proved. 2 Best on Evidence [Morgan's Ed.] sec. 406; 2 Greenleaf on Evidence [13 Ed.] sec. 516. The burden

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is always on defendant to show payment. *Yarnall v. Anderson*, 14 Mo. 619; *Wear v. Lee*, 26 Mo. App. 99, *loc. cit.* 105; *Ashbrook v. Letcher*, 41 Mo. App., *loc. cit.* 378; *Deland v. Bank*, 111 Ill. 323. Where one receives money as the agent of another, the burden is on him in an action to account therefor, to show that he repaid it to his principal or otherwise disposed of it by the latter's direction. *Young v. Powell*, 87 Mo. 128. This rule applies to bailees generally. *Read v. Railroad*, 60 Mo., *loc. cit.* 206. "The *onus* is upon him (garnishee) where the plaintiff has taken issue upon the answer after the admission that he held such funds at a period immediately or within a few weeks or even months preceding the service of the writ." Waples on Attachment & Garnishment, p. 377; *Barker v. Osborne*, 71 Me. 69; Drake on Attachment [5 Ed.] ch. 36, p. 585.

No brief filed for respondents.

THOMPSON, J.—The principal question for decision on this record relates to the burden of proof in proceedings by garnishment. The plaintiffs, who were partners, brought a suit by attachment against George Greene and John A. Dygert to recover the sum of $1,393.06. They were successful in the attachment suit. Their attachment was levied by garnishment upon the goods and chattels, rights and credits of the defendant in the hands of J. J. Hibler, and Hibler was summoned as garnishee. Hibler appeared and answered interrogatories exhibited to him, which answer was to the effect that, at the date of the service of the notice of garnishment, he had in his possession, belonging to the defendants, the sum of $956.72; that the same had been paid to him by the Lombard Investment Company for the use of the defendants; that he was not indebted to the defendants or either of them; that he did not

have either at the time when he answered or when he was summoned as garnishee, or since, any money, property, rights, effects, choses in action, or other things under his control or charge, belonging to the defendants, except as before stated. By order of the court the garnishee paid to the plaintiff the sum of $956.72, which the garnishee admitted to be in his hands, belonging to the defendants at the date of the service of the garnishment.

The plaintiffs, nevertheless, filed a denial, alleging that the garnishee was employed by the defendants as their agent to negotiate a loan for them; that he had, in August or September, 1890, effected said loan, to-wit, in about the sum of $2,600; that at said date he had received this sum for and as the agent of the defendants; that out of the proceeds of the loan he had paid to the plaintiffs $956 as aforesaid, and still had in his hands belonging to the defendants the sum of $210.75.

To this denial the garnishee filed a reply in the following language: "The said garnishee for reply to the denial of plaintiff's, the garnishee, answer says: It is not true that, at the time he was garnished, he had in his hands the sum of $1,166.75 due and belonging to defendants; that he has not now in his hands, nor did he have at the time he was garnished, the sum of $210 belonging to the defendant; that he has not now any sum of money whatever belonging to defendants; that, when he was garnished herein, he owed defendants the sum of $956.72, which he paid to plaintiff by order of the court; that he did not receive $2,600 from the Lombard Investment Company as agent of the defendants. Wherefore, he asks to be discharged."

In order to get a clearer idea of the manner in which the question for decision is raised, it should be stated that the notice of garnishment was served on the seventh of November, 1890; that in August or Septem-

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ber, 1890, the defendants had employed the garnishee to procure a loan for them from the Lombard Investment Company; that he had procured such loan for them; and that the money, amounting, exclusive of his commission and the expenses, to the sum of $2,572.50, had come into the hands of the garnishee as agent of the defendants to be disbursed on their orders. The plaintiffs then gave evidence tending to show that $210 of this sum, beyond the $956.72 paid under the order of the court, remained in the hands of the garnishee undisbursed, and belonging to the defendants at the date of the notice of the garnishment; and the garnishee gave evidence tending to show that all of it had been disbursed at that time, except the sum of $956.72 which he paid to the plaintiffs under order of the court.

Such being the substance of the evidence, the court submitted the issue to the jury upon the following four instructions, the first two given at the request of the plaintiffs and the remaining two at the request of the garnishee: "You are the sole judges of the weight of the evidence and of the credibility of the witnesses, and in determining the amount of credibility to be given to the testimony of any witness you may take into consideration the interest of said witness or witnesses in the result of this cause.

"The court instructs the jury that the only issue for them to determine in this proceeding is to determine from the evidence in the case what amount of money belonging to defendants, Green and Dygert, was in the hands of this garnishee, J. J. Hibler, at the time of his garnishment herein, to-wit, the seventh day of November, 1890, 9:40 o'clock A. M., and from that amount, if you find the same to exceed the sum of $956.72, subtract said $956.72, and render your verdict for the difference in favor of plaintiffs.

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"The court instructs the jury that the defendant Hibler having answered under oath to the garnishment in this cause, and having paid the sum of $956.72 into court, it now devolves on the plaintiffs to prove by the weight of testimony that the defendant at the time he was garnished had in his hands a greater sum than $956.72, and, unless plaintiffs have done so, you will find for the defendant, the garnishee.

"Unless the jury believe from the evidence that, at the time Hibler was summoned as garnishee in this case, he had in his hands a greater sum than $956.72 belonging to Green and Dygert, they will find for the defendant, and the burden of proving he had a greater amount than this devolves on plaintiffs."

And the court refused the following instructions requested by the plaintiffs, and they excepted: "The court instructs the jury, if you believe from the evidence that J. J. Hibler was and is the agent of George Green and John A. Dygert, then it devolved upon him to show that he has paid out all of their money at their request."

The plaintiffs also excepted to the two instructions given at the request of the garnishee.

The jury having returned a verdict for the garnishee, and the court having refused a new trial, the plaintiffs appeal to this court and assign for error that the court refused this instruction requested by them and gave the two instructions requested by the garnishee. These assignments of error were based upon the proposition that, as it appeared that a larger sum of money had, a short time prior to the service of the garnishment, come into the hands of the garnishee than the sum which he had admitted to have in his hands belonging to the defendants and which he paid over under order of the court, the burden was upon him to show that, by disbursements or otherwise, under the

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orders of the defendants, he had acquitted himself of all their moneys except the sum which he admitted to be due, and which he paid into court. In support of this proposition counsel for the plaintiffs appeal to several well-known propositions. One of these is that in an action to recover a debt, where the defendant alleges his payment of the debt, the burden is upon him to prove payment. Another is that where the defendant, who has received money as the agent of the plaintiff, is sued by plaintiff for such money, the burden is upon him to account for the same, by showing that he has repaid it to the plaintiff, or that he has otherwise disposed of it by the latter's directions. *Young v. Powell*, 87 Mo. 128. Another is that the burden is upon the bailee to account to his bailor for the thing bailed. These propositions are not controverted; but, in the applications which counsel for the plaintiffs seek to make of them, they overlook certain fundamental principles relating to the burden of proof. One of these principles is that the burden of proof, in a civil action, is fixed by the frame of the pleadings; that is, by the papers issued and by subsequent admissions of record. Another is that the burden of proof, when thus affixed, never shifts during the trial, so long as the evidence is directed to the same proposition of fact. *Feurt v. Ambrose*, 34 Mo. App. 366; *McCartney v. Ins. Co.*, 45 Mo. App. 379. The leading case affirming this proposition is *Powers v. Russell*, 13 Pick. 69, 76, where the opinion was given by Chief Justice SHAW. The following cases also state and illustrate it: *Tourtellot v. Rosebrook*, 11 Metc. 460; *Morrison v. Clark*, 7 Cush. 213; *Tarbox v. Steamboat Co.*, 50 Me. 345; *Central Bridge Corp. v. Butner*, 2 Gray, 130, 132; *Sperry v. Wilcox*, 1 Metc. 270; *State v. Flye*, 26 Me. 312; *Bloomfield v. Smith*, 1 Mees. & W. 542. These cases point out a distinction which is often over-

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looked, between the shifting of the burden of proof and the shifting of weight or preponderance of evidence during a trial. .The preponderance of evidence may, in the course of a judicial trial, shift several times from side to side; but this is a matter which can never be disclosed upon the face of the record or judicially known, for it is a matter resting exclusively in the opinion of the jury, who are to determine the credibility of the witnesses.

To illustrate this distinction between the shifting of the burden of proof and the shifting of the preponderance of evidence, let us take the common case of an action of trover by a bailor against a bailee. The plaintiff gives evidence tending to show the bailment, a demand for a restoration of the thing bailed and a refusal of the demand. He then rests. This does not shift the burden of proof, as is often loosely said even in judicial opinion; it merely shifts the preponderance of evidence, and casts upon the defendant the danger of losing his defense, unless he rebuts the evidence. It does not follow as a conclusion of law that the plaintiff is, in such a case, entitled to a recovery even though the defendant gives no countervailing evidence; since the jurors, who are the judges of the credibility of the plaintiff's witnesses, may choose to disbelieve them. The true theory is that the burden of proof does not shift in the course of a judicial trial until the proposition of fact which is affirmed by the party originally sustaining the burden of proof becomes established in such a sense that it ceases to be controverted upon the record, but is established in a sense as a mere conclusion of law. It is perhaps choosing too strong an expression to say, as was said by the Kansas City Court of Appeals in *Feurt v. Ambrose*, *supra*, that the burden of proof never shifts under any circumstances whatever. For instance, where the plaintiff sustains the burden of proof the

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defendant may see fit, after having heard the plaintiff's evidence at any stage of the trial, to admit upon the record the proposition of fact which the plaintiff affirms; and this will undoubtedly shift the burden of proof, because the court would then be authorized to direct the jury to find that such facts had been established. So, if in such a case, after the plaintiff has put in all this evidence, the defendant himself takes the witness stand, and on oath states or admits the proposition of fact contended for by the plaintiff, this, it may be conceded, will shift the burden of proof and cast upon him the *onus* of avoiding it.

It has always been the law in this state that the answer of a garnishee, made as it must be under oath, is evidence in his own favor. *Davis v. Knapp*, 8 Mo. 657; *McEvoy v. Lane*, 9 Mo. 48; *Quarles v. Porter*, 12 Mo. 76; *Smith v. Heidecker*, 39 Mo. 157. It is, moreover, conclusive evidence in favor of the garnishee, unless it is overthrown by evidence on the part of the garnishing creditor. *Holton v. Railroad*, 50 Mo. 151; *Reinhart v. Soap Co.*, 33 Mo. App. 24. If the garnishee in his answer does not admit the indebtedness, the garnishing creditor must by a denial raise a triable issue. *McCause v. McClure*, 38 Mo. 410. This issue is not raised by the interrogatories and the answer of the garnishee; but it can only be raised by a denial of the answer by the garnishing creditor and a reply thereto by the garnishee. *Brown v. Gummersell*, 30 Mo. App. 341. Interrogatories and the answer are merely preliminary to the framing of this issue. This denial of the answer by the garnishing creditor stands in the place of the petition of the plaintiff in an ordinary action at law. *Union Bank v. Dillon*, 75 Mo. 380; *Groschke v. Bardenheimer*, 15 Mo. App. 353. It necessarily follows from these statements of legal doctrine that the burden of proof is upon the garnishing creditor; for, in order to

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determine the initial burden of proof in any case, it is only necessary to consider which party would be entitled to invoke the judgment of the court if no evidence at all were introduced; and we have seen that, if no evidence is introduced to overthrow the answer of the garnishee, it is conclusive in his favor, and he is entitled to invoke the judgment of the court in his favor and be discharged. This is not only our law in Missouri, but it is the general law. It is stated by a recent meritorious treatise that "the presumption is not in favor of the plaintiff on a question between him and the garnishee, whether the latter has assets of defendant in his hands. The *onus* is upon the plaintiff." Waples on Attachment & Garnishment, p. 376, citing many cases.

If the garnishee had, either in his answer or in his reply to the denial, admitted that, in a recent period prior to the service of the garnishment, he had received a larger sum for and on account of the defendants than the sum which he paid over on the order of the court, then it may be conceded that the burden would have been on him to show that he had disbursed such moneys for or on the orders of the defendants. Such was the ruling in *Parker v. Osborne*, 71 Me. 69, where the garnishee made a similar admission in his "disclosure," which under the system in Maine corresponds to the answer under our system. But the garnishee in this case made no such admission, either in his answer or in his reply to plaintiff's denial, but in his reply he denied the plaintiff's allegations on the point. There is no sound legal conception, then, upon which it can be held that the burden of proof rested upon him to show in what manner he disbursed the money which he had received as the agent of the defendant, until, when he took the witness stand after the plaintiff's evidence was

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all in, he admitted that he had received for the defendants as their agent the sum already stated. It may be that, when he made that admission, it was conclusive against him for every purpose of the trial, and that it had the effect, under principles already stated, of shifting the burden of proof upon him so as to require him to show by a preponderance of evidence that he had disbursed the moneys for or under the orders of authority of the defendants prior to the service of the garnishment, except the amount which he confessed and paid into court. If an instruction had been drawn in apt form explaining this principle to the jury, and informing them that it became necessary for the garnishee to show by a preponderance of evidence that he had paid out all of the money of the defendants at their request aside from what he paid into court, we are not prepared to say that the court would have been justified in refusing it.

Upon the other proposition, that the verdict is unsupported by the evidence, it is sufficient to say that, although the evidence may have preponderated in respect of its credibility in favor of the plaintiff,—a matter with which an appellate court has nothing to do in a case at law,—yet the jury could not have found for the plaintiff without discrediting the testimony of the garnishee.

Finding no error in the record, it is ordered that the judgment be affirmed. All the judges concur; Judge Biggs in the result only.

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JOHN M. DEVORE, Respondent, v. VITALLIS STAECKLER *et al.*; CHRISTIAN SPARFELD, Appellant.

St. Louis Court of Appeals, May 3, 1892.

Appeal from Justices' Courts: JURISDICTION OF APPELLATE COURT. A justice of the peace sent to the circuit court of his county a transcript of his docket in a cause, showing that final judgment had been rendered therein, but the record failed to show that any affidavit or bond for appeal was filed with the justice, or that any appeal was allowed by him, or that the allowance of the appeal was procured under Revised Statutes, 1889, section 6333, by proceedings in the circuit court. *Held*, that neither the circuit court, nor this court on appeal to it, acquired any jurisdiction to dispose of the cause on its merits, and that the cause should, therefore, have been stricken from the docket of the circuit court.

Appeal from the Cape Girardeau Circuit Court. HON. H. C. O'BRYAN, Judge.

REVERSED AND REMANDED (*with directions*).

Wilson Cramer, for appellant.

J. W. Limbaugh, for respondent.

THOMPSON, J.—This was a suit commenced before a justice of the peace against two defendants jointly, Thedallis Staeckler and Christian Sparfeld. The justice rendered a judgment for the plaintiff against both defendants, and there was a supposed appeal to the circuit court. In the circuit court a judgment was rendered *de novo* against the defendants and John G. Schulz as surety on their appeal bond, from which judgment the defendant Sparfeld prosecutes the present appeal to this court. The respondent challenges the jurisdiction of the circuit court and of this court to deal with the merits, on the ground that no appeal was ever granted by the justice of the peace to the circuit court

in compliance with the statute or otherwise. In order to the proper determination of this question it seems necessary for us carefully to set out the various steps touching the appeal, which took place in the justice's court and afterwards in the circuit court, stating them in their chronological order; next, to set out several provisions of the governing statute; and, finally, to ascertain the application of these statutory provisions to the facts set out.

This action was commenced before the justice of the peace on August 23, 1889. The justice's transcript recites that "plaintiff filed, August 23, 1889, for suit, an account for $35.52, dated July 8, 1889." Summons was issued to a constable, returnable September 7, 1889. On that day the justice entered a judgment of nonsuit, by reason of the failure of the plaintiff to appear. He afterwards set aside this judgment "for good grounds," and set the cause down for trial on the fifth day of October, 1889. On that date the case was called for trial, and his transcript of the trial is as follows: "The summons issued in this case returned executed as the law directs, and the cause coming on to be heard, the plaintiff having made proof of his complaint, it is, therefore, considered by the justice that plaintiff recover of defendants the sum of $35.52 for his debt, and $5.05 for his costs, and that he have execution therefor." This was all that the justice sent to the circuit court, and was the only basis of the jurisdiction upon which the circuit court assumed to render judgment on the merits. He sent up no statement of the account sued on, such as the statute (R. S., sec. 6138) requires to be filed, and which, though formal strictness is greatly relaxed, is necessary as a basis of jurisdiction, just as a petition is in a suit commenced in the circuit court. He sent up no transcript entry of an order granting an appeal from his judgment to the circuit court. He sent

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up no affidavit for such an appeal. He sent up no bond for such an appeal. Keeping in mind the date of the justice's judgment, namely, October 5, 1889, and, following the dates in their chronogical order, we find that, on August 26, 1891 (a judgment of some sort having been previously rendered in the case in the circuit court), the defendant Sparfeld made some sort of a motion to have the same corrected and properly re-entered of record; whereupon the court amended and corrected such previous judgment and re-entered the judgment from which this appeal is taken. From certain recitals in the bill of exceptions we infer that the original judgment of the circuit court (prior to its being corrected) was entered at the May term, 1891; that a motion for new trial was made at that term, and continued to the August term, A. D. 1891, the date at which the judgment was corrected and re-entered. On the hearing of the motion for new trial the defendant submitted certain evidence, consisting of: *First.* A motion made by the plaintiff at the May term, 1890 (*sic*), and filed May 7, 1890, to dismiss this appeal. The grounds of the motion were: "That there is no transcript filed herein showing that any appeal was ever granted; that there is no affidavit for appeal filed by the appellant herein; that said appeal, if any was ever taken or granted, was taken and granted more than ten days before the date of the January term, 1890, of this court, and no notice of appeal had ever been given to this appellee." *Second.* A rule on the justice of the peace, granted at the January term, 1890, of the circuit court, commanding him to "certify to the clerk of the court a full, true and correct transcript of the record and proceeding had before him herein, together with all the original papers," and continuing the cause. *Third.* An affidavit for appeal made by the defendant, Christian Sparfeld, *in the circuit court* at the May term,

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1890, which affidavit seems to be in due form, and to have been filed by the clerk of the court on the fourteenth of May, 1890. This, it is perceived, was an attempt on the part of Sparfeld to perfect the appeal under the provisions of section 6340 of the Revised Statutes, which will hereafter be set out. *Fourth.* An entry from the records of the circuit court, showing a filing of this affidavit, but not exhibiting any order *of the circuit court* granting an appeal from the justice, as the clerk, in making up his transcript, states by way of recital. *Fifth.* An entry from the records of the circuit court, showing that the appellee (this plaintiff) entered his appearance in the circuit court at the August term, 1890, and on the twenty-sixth day of August, which entry is as follows: "Now comes the plaintiff and appellee herein, by attorney, and enters his appearance." *Sixth.* An appeal bond signed by the defendant Sparfeld with John G. Schulz as surety. This bond is as follows:

"We, the undersigned, Thedallis Staeckler, Frederick Sparfeld and John G. Schulz, acknowledge ourselves indebted to John M. Devore in the sum of $100, to be void upon this condition: Whereas, Thedallis (*sic*) Staeckler, Frederick (*sic*) Sparfeld and John G. Schulz has (*sic*) appealed from the judgment of William Stroder, a justice of the peace, in an action between John M. Devore, plaintiff, and Thedallis Staeckler and John G. Schulz, defendants; now, if on such appeal the judgment of the justice be affirmed, or if, on the trial anew in the appellate court, judgment be given against the appellant and he shall satisfy such judgment, or if his appeal shall be dismissed, and he shall pay the judgment of the justice, together with the costs of the appeal, this recognizance shall be void.

"C. Sparfeld,
"John G. Schulz."

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Seventh. The justice's transcript, the substance of which has already been set out in the foregoing portion of this statement.

Let us next consider the applicatory statutes on the subject of granting and perfecting appeals from justices of the peace to the circuit court. By section 6328 of the Revised Statutes, it is provided: "No appeal shall be allowed in any case, unless the following requisites be complied with: *First*, the appeal must be made within ten days after the judgment was rendered; but, if a non-resident of the county where the suit shall be instituted, the party shall, in all cases of appeal allowed by this article, have twenty days to make such appeal; *second*, the applicant, or some person for him, together with one or more solvent sureties, to be approved by the justice, must, within the time prescribed in the first clause of this section, enter into a recognizance before the justice of the adverse party, in a sum sufficient to secure the payment of such judgment and the costs of the appeal, conditioned that the appellant will prosecute his appeal with due diligence to a decision; and that if, on such appeal, the judgment of the justice be affirmed, or upon a trial anew in the appellate court judgment be given against him, he will pay such judgment; and that, if his appeal be dismissed, he will pay the judgment of the justice, together with the costs of the appeal."

The next section prescribes the form of the recognizance, which need not be considered, because the above recognizance, if otherwise good, was in sufficient form.

The next section (R. S., sec. 6330) provides as follows: "No appeal shall be allowed, unless the party applying therefor, or some person for him, will make affidavit that the application for an appeal is not made for vexation or delay, but because he believes the appel-

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lant is injured by the judgment of the justice, and stating whether such appeal is from the merits, or from an order or judgment taxing costs."

Section 6332 contains this provision: "Upon an appeal being made, according to the foregoing provisions, the justice shall allow the same, and immediately make an entry of such allowance in his docket."

Section 6333 provides as follows: "If the justice fail to allow an appeal in the cause, when the same ought to be allowed, or if by absence, sickness or any other cause, on his part, an appeal cannot be taken in time, the circuit court, or other court having jurisdiction of such appeal, or judge thereof in vacation, on such fact satisfactorily appearing, may, by rule and attachment, compel the justice to allow the same, and to return his proceedings in the suit, together with the papers required to be returned by him." This section is quoted for the mere purpose of stating that the record in this case fails to disclose the state of facts on which it is predicated, namely, that the justice failed to allow an appeal in the cause, when the same ought to have been allowed, or that by reason of absence, sickness, or any other cause on his part, an appeal in the cause could not be taken in time. Nor was any application made for a rule on the justice under this section.

Section 6334 is as follows: "If in any case the justice shall allow an appeal, and certify in his certificate the cause of his failure to allow the same at the proper time, such appeal shall be sustained when it would have been competent for the court to have ordered the same to be allowed, and in all cases when the bond and affidavit required shall have been filed or deposited with the justice in due time, and the justice shall have returned such appeal to the appellate court, the same shall be considered as having been allowed by the justice, although no entry thereof shall appear

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in the record." It is perceived that this section contains two provisions: The first relates to the case where the justice allows an appeal bond within the time prescribed by section 6328; that is to say, ten days for residents and twenty days for non-residents of the county, and it makes a rule for the government of the circuit court, relaxing the strict provisions of that section by authorizing the circuit court to sustain the appeal, when it would have been competent for the circuit court, under the preceding section, to compel the justice by rule and attachment to return the proceedings, as on appeal, to the circuit court. It is apparent that this provision has no application to the case under consideration, because it nowhere appears that the justice allowed an appeal at any time. The second part of this section, it is perceived, relates to the case where bond and affidavit for appeal have been deposited with the justice in due time, and the justice had failed by a misprision to make an entry in his transcript showing the granting of an appeal, but has returned the papers to the circuit court as though an appeal had been granted, in which case the statute dispenses with the formality of the entry on the justice's transcript showing a grant of the appeal, and requires the circuit court to treat the case as though the entry had been duly made and the appeal formally granted. This part of the statute has equally no application to the case before us; because, *first*, it nowhere appears that an affidavit for appeal was ever made before the justice of the peace; or, *second*, that a bond for appeal was deposited with him "in due time."

Recurring now to the bond above set out, it nowhere appears that this bond was ever returned to the circuit court by the justice of the peace as and for an appeal bond in the case, except by the recital in the bill of exceptions of its being offered in evidence by the

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defendant Sparfeld at the hearing of the motion for new trial. This recital describes it as "an appeal bond, signed by C. Sparfeld and John G. Schulz and filed in the justice's court, as follows;" then setting out the bond as already quoted. But the bond itself nowhere shows that it was ever taken or approved by the justice of the peace, nor does it contain any date whatever, nor is there anything to show how it got into the circuit court, or that the justice of the peace ever returned it to the circuit court as one of the papers in the case; and if it were otherwise effective to help out the right of appeal of the defendant Sparfeld from the justice to the circuit court, it would fail, under the statutory provisions just quoted, for the reason that it does not appear that it was filed within ten days after the date of the judgment of the justice, or that it was filed within twenty days after such date, the defendant Sparfeld being a non-resident of the county.

There is still another statutory provision which has a bearing on the question before us. It is found in section 6340 of the Revised Statutes, and is as follows: "No appeal allowed by a justice shall be dismissed for want of an affidavit or recognizance, or because the affidavit or recognizance made or given is defective or insufficient, if the appellant or some person for him will, before the motion to dismiss is determined, file in the appellate court the affidavit required, or enter into such recognizance as he ought to have entered into before the allowance of the appeal, and pay all costs that shall be incurred by reason of such defect or omission, with respect to such affidavit or recognizance." This section, it is perceived, relates to cases where an appeal has been allowed by the justice, but where no affidavit or recognizance, or no sufficient affidavit or recognizance has been filed, in which case the statute allows the omission or defect to be supplied

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in the circuit court upon terms. This section can have no application to the case under consideration, because it nowhere appears that an appeal was ever allowed by the justice in this case.

We find, then, that this record fails to show that any affidavit for appeal was ever filed with the justice; or that any bond for appeal was ever filed with the justice within the time prescribed by the statute; or that any such bond was ever filed at all and returned to the circuit court; or that any appeal was ever allowed by the justice; or that any effort to have an appeal allowed was ever made in the circuit court, under section 6333 of the Revised Statutes; and we must conclude that the record is wholly barren of anything showing that an appeal was taken from the judgment of the justice of the peace to the circuit court under the statutes. It results that the circuit court had no jurisdiction to dispose of this case on its merits, and that we have no such jurisdiction on this appeal, as our jurisdiction is necessarily derivative from the justice through the circuit court. In dealing with an analogous case in *Green v. Castello*, 35 Mo. App. 127, 135, where an appeal had been granted by the probate court to the circuit court, but not in compliance with the statute, the form of our judgment was that the judgment of the circuit court be reversed, and the cause remanded with directions to dismiss the appeal from the probate court. But in this case no appeal was ever granted or attempted to be granted by the justice; and, therefore, our judgment will be, that the judgment of the circuit court be reserved, and the cause remanded with "directions to strike the cause from its docket for want of jurisdiction." All the judges concur.

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P. B. Perkins, Respondent, v. F. E. Headley *et al.*, Appellants.

St. Louis Court of Appeals, May 3, 1892.

1. **Accord and Satisfaction:** IMPLICATION FROM SILENCE. An accord and satisfaction may be proved by the conduct of the parties as well as by their express agreement. But *held*, that the mere fact that the plaintiff received from the defendants less than the amount of his claim in silence, and with knowledge that the defendants claimed to be indebted to him only to the extent of the payment made, did not conclusively and as matter of law establish an accord and satisfaction.

2. ———: ACCEPTANCE OF SPECIFIC TENDER OF LESS THAN CLAIM IN FULL SATISFACTION. *Held* further, however, in the course of discussion, that where a controversy as to the amount of the indebtedness exists between a creditor and his debtor, and the debtor tenders to the creditor the amount which he claims is due on condition that the acceptance of it should discharge the entire demand, the acceptance will constitute an accord and satisfaction as a matter of law, since one who accepts a conditional tender assents to the condition.

Appeal from the Greene Circuit Court.—Hon. W. I. Wallace, Judge.

Affirmed (Biggs, J., *dissenting*).

T. J. Delaney, for appellants.

Heffernan & Buckley, for respondent.

Thompson, J.—This was an action upon a contract of subscription. The case was tried before the court sitting as a jury, and the plaintiff had a verdict and judgment, from which the defendants prosecute this appeal. The case very closely resembles the case of *Perkins v. Bakrow*, 45 Mo. App. 248. The defendant in that case and the defendants in this case were subscribers upon the same subscription paper. The petition in this case alleges in substance that, in the month of ——, 1887, the defendant with others contracted in

writing by way of a subscription to one F. S. Heffernan, his associates and assigns, as follows, to-wit:

"We, the undersigned, agree to pay F. S. Heffernan, his associates and assigns, the respective amounts subscribed by us, to become due and payable to the said F. S. Heffernan, his associates and assigns, as follows:

"One-third payable on demand, when the provision of this subscription is accepted by the said F. S. Heffernan, his associates and assigns.

"One-third, when the opera house hereafter mentioned is inclosed.

"One-third, when said opera house is completed.

"In consideration of this subscription the said F. S. Heffernan, his associates and assigns, shall locate and build an opera house on Boonville street, near Center street, in the city of Springfield, Missouri, at a cost for the site and building of about $40,000."

(Here follow names of subscribers and amounts subscribed, including Headley Bros., $1,000.)

The petition further alleges the assignment of the subscription paper by the said Heffernan to P. B. Perkins, the plaintiff herein, full performance of the contract on the part of the plaintiff, his demand upon the defendants for payment, and their refusal to pay.

The answer admits the signing by the defendants of the subscription paper set out in the petition for the purposes therein stated, in the sum of $1,000, and then sets up two special defenses in separate counts as follows: *First.* For the first defense the answers avers that the subscription was made and obtained on representations made to said defendants, that said opera house would be built on a site at or near the spice mills on the east side of Boonville street, which said representation was the sole inducement for said subscription; that said opera house was not built as and where it was represented it would be built, to the great injury of

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defendants, who owned no property in the vicinity of the site selected, but who owned much valuable property at and near the place formerly selected. It is perceived that this paragraph of the answer does not allege that the representations were made by Heffernan, or by the plaintiff, or by anyone authorized to make them for either. We add, after a careful examination of the testimony, that there was no substantial evidence of any such representation having been made either by Heffernan or by this plaintiff, or by anyone authorized by Heffernan or this plaintiff so to make representations. This requires us to lay this paragraph of the answer and all the evidence adduced in support of it, and the declarations of law given by the court with reference to it, entirely out of view, and to deal with it as we dealt with the case of *Perkins v. Bakrow, supra*, by holding that it is no defense whatever to an action upon this contract, that the defendants may have been induced to sign it by persons not authorized by the obligees therein named.

The second paragraph of the answer, setting up a separate special defense, is as follows:

"And, for another defense, defendants say that, after the subscription as alleged by plaintiff, the site of said opera house was changed from at or near the spice mills to the place south of Center street, where it is now built; and the plaintiff and defendants, in consideration that said Headley Bros. should consent to said change of location, agreed that their subscriptions should be for the sum of $500; that pursuant to said agreement defendants paid, and plaintiff accepted, the said sum of $500 in full payment on said second contract."

This special defense, and the evidence adduced in support of it, introduced an element which was not in the case of *Perkins v. Bakrow, supra*, and which

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requires a different treatment from that which disposed of that case. There was evidence, though of an unsatisfactory character, but, nevertheless, we feel bound to say, evidence such as a jury might have believed, sustaining the special defense thus pleaded. That evidence tended to show that there was a committee of citizens for the promotion of the building of the opera house, which was evidently deemed an object of public benefit to the city of Springfield, and to property-owners therein; that Oscar M. Headley, one of the defendants in this action, was an active member of that committee; that Oscar M. Headley, for the period of about three months, circulated the subscription paper on which the present action is brought, and represented to persons, whose subscriptions he solicited, that the opera house would be built on Center street near the spice mills; that ground was definitely broken by Perkins, this plaintiff, on a lot at that location, which would naturally have the effect of impressing the public with the conclusion that it had been definitely selected as the site for the opera house; that it was finally found that this lot was unsuitable, because too small; that, accordingly, a meeting of the committee was held, at which the change of site was discussed; that at this meeting it was perceived that *these defendants* would be more injuriously affected by the change, by reason of the location of their property, than would any other subscriber; that, accordingly, this plaintiff at that meeting publicly announced that he would make it right with these defendants; that he subsequently authorized one Hornbeak, whom he had appointed to collect the subscriptions, to arrange the matter with the defendants; and that Hornbeak, acting under this authority, did arrange with these defendants that they should pay one-half of their subscription, and that the other half should be released, and that they paid $500 of it accordingly.

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This evidence was strongly rebutted. It is not claimed that the site, which was selected, was not within the limit expressed in the written subscription paper. The plaintiff testified pointedly that he neither agreed, nor intended, nor represented, that he would select the site near the spice mills, and that he never authorized any one to make such representations for him. He also testified that he broke ground on the lot near the spice mills at the request of this committee, which included Amos M. Headley, one of these defendants, and for no other reason. He did admit in substance that, at the meeting of the committee above referred to, he did say that he would arrange the matter with the defendants, recognizing some claim on their part in consequence of having to select a site so far from their property; but he testified that what he proposed was to take one-half of their subscription in groceries, and that he did purchase $300 worth of groceries of them, when they repudiated the arrangement and sued and got a judgment against him for the amount. They, on the other hand, gave evidence denying this arrangement about taking half of the subscription in groceries; and their evidence was to the effect that they were not in the grocery business at that time, though one of the Headley Brothers was. The plaintiff also denied totally that he ever authorized Hornbeak to make any adjustment with the defendants of their subscriptions by taking less than the full amount which they had subscribed, and in this he was distinctly and pointedly supported by the evidence of Hornbeak himself. But the defendant's evidence was to the effect, that the plaintiff told them that Hornbeak was so authorized, and that Hornbeak did agree to adjust their subscription for one-half; and that they did pay the $500 in three separate installments of $166 each, in pursuance of that agreement, and that the money was received by the plaintiff accordingly.

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In reference to this evidence the defendants tendered the following declaration of law, which the learned judge refused:

"If the court, sitting as a jury, believes from the evidence that, after the subscriptions by defendants the site was changed and the present site selected, the plaintiff stated to the defendants that he would make it all right with defendants on account of the change in said site, and if the court, sitting as a jury, believes that defendants relied upon said promise, and made no objection on account of said change, and if the court sitting as a jury further believes that, when the first call was made on defendants on said subscriptions, they claimed to be liable only for $500 and paid accordingly, and that said claim was communicated to plaintiff, who remained silent and permitted defendants to make two other payments on that basis, and that said first payment and claim was made before the building was begun, then defendants are entitled to recover."

From the hypothesis of fact contained in this instruction the jury would be warranted in finding that there had been an accord and satisfaction between the parties, but they would not be obliged to draw that conclusion as a conclusion of law. An accord and satisfaction is a contract, and, like other contracts, requires a consideration to support it. But where there is a dispute between the parties as to their respective rights, and for that reason the obligee in the contract agrees to take less than the terms of the contract import, that, in general, furnishes a good consideration. Such was plainly the case upon the evidence here, assuming that a jury would believe it as given in behalf of the defendants. That evidence tended to show not only a claim of a deviation from the original contract as made and understood, but it also tended to show that

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the plaintiff admitted that the defendants had some claim to an abatement of their subscription by reason of that deviation. This state of facts probably furnished a good consideration to support an accord and satisfaction.

An accord and satisfaction may, as in the case of other contracts, often be proved by the conduct of the parties, as well as by their express agreement. We have no difficulty in holding that the hypothesis of fact contained in the above instruction furnished evidence tending to show an accord and satisfaction, from which the jury would be warranted in making that deduction. We are of the opinion that there is no rule of law which would oblige them to make it. We know of no rule of law which, under the collection of facts there stated, ascribes the conclusion of an accord and satisfaction to the mere silence of the plaintiff, which silence, it is easy to conclude, may equally have been the result of some other motive. A creditor does not, by voluntarily accepting a part of what is due him, release the remainder. But if there is a controversy between him and his debtor as to the amount which is due, and if the debtor tenders the amount which he claims to be due, but tenders it on the condition that the creditor accept it in discharge of his whole demand, and the creditor does accept it, that will be an accord and satisfaction as a conclusion of law, the principle being that one who accepts a conditional tender assents to the condition; he cannot take the money and reject the terms on which it is tendered, when the party making the tender announces to him that he will not pay it on any other conditions. In order to create an accord and satisfaction, as a conclusion of law, on the preliminary hypothesis of fact, contained in the above instruction, it would have been necessary for the defendants to tender the $500 on the condition that it be accepted in full satis-

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faction, and to decline making payment unless that condition were acceded to. If, then, the plaintiff had accepted the tender, he would have estopped himself from maintaining an action for the remaining $500. These principles are elementary, and they justified the learned judge in refusing to give this instruction.

It results that the judgment must be affirmed. It is so ordered. Judge ROMBAUER concurs. Judge BIGGS dissents.

ALBERT M. ENGLISH, Respondent, v. JAMES M. SEIBERT *et al.*, Appellants.

St. Louis Court of Appeals, May 3, 1892.

1. **Principal and Surety:** EFFECT OF MERE NON-ACTION OF CREDITOR IN ENFORCEMENT OF ADDITIONAL SECURITY. A creditor of two debtors, who occupy the relation of principal and security, does not impair his claim against the surety by mere non-action or neglect in enforcing a lien against the property of the principal debtor, obtained from such principal through his own exertions after the contraction of the debt, as where, after the recovery of judgment against both debtors, he obtains a chattel mortgage on property of the principal debtor, the benefit whereof is lost owing to its not being acknowledged and, therefore, not recorded, and to the sale of the mortgaged chattels by the principal debtor.

2. ———: EFFECT OF VOLUNTARY SURRENDER OF ADDITIONAL SECURITY BY CREDITOR. A distinction is, however, drawn between the effect in this respect of mere non-action or neglect on the part of the creditor, and affirmative action on his part in voluntarily surrendering such additional security, it being conceded that such voluntary surrender will operate as a release of the surety to the extent of the value of such additional security.

Appeal from the Cape Girardeau Circuit Court.—HON. H. C. O'BRYAN, Judge.

REVERSED.

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Wilson Cramer, for appellants.

W. H. Miller, for respondent.

THOMPSON, J.—This is a suit in equity against the plaintiff in a judgment, and also against the sheriff holding an execution thereunder, to enjoin an enforcement of the judgment. The ground of the action was that the plaintiff was a surety in the debt which had passed into judgment, and that, since the rendition of the judgment, the principal defendant had taken a chattel mortgage from the principal debtor upon a crop of wheat, and that he had negligently suffered the principal judgment debtor to make way with the wheat instead of enforcing his security against it,—by reason of which negligence the plaintiff had become released from his obligation to satisfy the debt to the extent of the value of the property embraced in the chattel mortgage. The plaintiff had a decree for a perpetual injunction, and the defendant prosecutes an appeal to this court.

It appeared in evidence that, on February 5, 1876, Hiram T. Dickerson and Albert English executed their joint note for $125 to Lowndes H. Davis; that, after the maturity of said note, the defendant Seibert became the purchaser and owner thereof; that Seibert brought suit thereon against both of the makers thereof, and recovered judgment against them; that in the meantime Seibert had removed from Cape Girardeau to Jefferson City, and had left the collection of his debts and the charge of his business in the hands of R. P. Wilson, as his agent and attorney. The scope of Wilson's powers as agent and attorney does not very distinctly appear. Wilson brought suit on the note and prosecuted it to judgment for Seibert. He caused execution to be sued out thereunder, which execution,

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at the request of English, he caused to be returned unsatisfied, English paying the costs. English was solvent, but Dickerson, the other judgment defendant was not. Wilson knew that English was surety on the note for Dickerson, although he did not appear to be such on the face of the note. He testified: "I had been attempting to collect the judgment from Dickerson, *knowing him to be the principal*, and conversed frequently with Albert M. English about the matter, that he might assist me in the collection of the debt, *so as to assist himself.*" In another place Wilson testifies: "I knew or was informed by the parties that English was a surety on the note."

After the note had thus been reduced to judgment, it was arranged between Dickerson, the principal judgment defendant, and Wilson, acting as attorney and agent for Seibert, the plaintiff in judgment, that Dickerson should secure the judgment by giving a chattel mortgage upon his crop of wheat. But, when it came to fulfilling this agreement, Dickerson merely *signed* such a mortgage and *delivered* it to Wilson, but refused to *acknowledge* it formally so that it could be put upon record. His object in refusing to acknowledge it and have it go to record was that he did not wish to make a public disclosure of the fact of giving it. Of course, the mortgage was good between the parties after being signed and delivered, without being formally acknowledged and recorded.

After thus having given the chattel mortgage, Dickerson proceeded to harvest and thresh his wheat, and to market it load by load. As fast as he sold it, some of his other creditors would pounce upon him, and get the money away from him, as he testifies, for he was deeply involved in debt. Before Dickerson had threshed his wheat, Wilson informed English, this plaintiff (the surety), that he had taken this mortgage.

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It was also in evidence that, when Dickerson began to thresh the wheat covered by the mortgage, Cracraft, the sheriff, stepped into the office of Wilson, English being present, and advised Wilson of the fact that Dickerson was threshing his wheat, and told him that it was now time to make his money on the chattel mortgage. Nevertheless, Wilson wholly neglected to take any step to enforce the mortgage, or to prevent Dickerson from marketing his wheat and pocketing or disposing of the proceeds. Wilson himself testifies: "I never realized anything out of the chattel mortgage, and made no effort to collect proceeds of the wheat, or to take the property into my charge under the chattel mortgage. When Dickerson refused to have his acknowledgment taken, while I put the chattel mortgage in my desk, I paid no attention whatever to it, but made an agreement with him outside of that mortgage that he should put his wheat into Horrell's mill, and notify me when he did so, in order that I could go and draw the money. I made no effort to realize on the mortgage." The value of the wheat was less than the amount of the judgment; but English, having ascertained the value of the wheat, tendered the difference between its value and the amount of the judgment, namely, $130, to Wilson, which tender was rejected. He thereafter brought the present action in equity to enjoin the enforcement of the judgment to the extent of the value of the wheat covered by the mortgage.

Upon this state of facts we take the law to be that English was not entitled to an injunction. This conclusion seems indisputable, notwithstanding several propositions of law invoked by the plaintiff, which are firmly settled in this state. One of these propositions is that a comaker of a promissory note, not negotiated before maturity in the usual course of business, may

show by evidence *aliunde*, that it was understood by the parties that his liability was that of a surety, and that he has been discharged by such matters subsequent as would discharge any other surety. *Noll v. Oberhellman*, 20 Mo. App. 336. Another of these principles is that the relation of principal and surety, and the rights of a surety in respect of his exoneration by matters subsequent, are not destroyed by the fact of reducing to judgment the debt for which he stands as surety. *Priest v. Watson*, 75 Mo. 314; *Rice v. Morton*, 19 Mo. 263; *Smith v. Rice*, 27 Mo. 505. Another principle is that, while a creditor is not in general bound to take any *initiatory steps* to protect the surety in the debt, yet if the creditor does take into his hands property of the principal debtor to be applied in discharge of the debt, or acquires in any manner a valid lien upon such property, and afterwards voluntarily releases such property or such lien, he thereby exonerates the surety to the extent of the value of such property, or to the extent of what could have been realized by the enforcement of such lien. *Ferguson v. Turner*, 7 Mo. 497; *Rice v. Morton*, 19 Mo. 280; *Priest v. Watson*, 75 Mo. 315; *Lower v. Bank*, 78 Mo. 67. The principle is applied not only to exonerate a surety where another lien or security is held by the creditor against the principal debtor and released, but also to exonerate him *pro tanto* where such a lien or security is held by the principal debtor against a cosurety and released. The principle has been applied where a levy has been made and released (*Lower v. Bank*, *supra*; *Priest v. Watson*, 75 Mo. 310); and even where the creditor, having reduced his demand to judgment, has sued out an execution thereon which became a lien upon property, which execution he afterwards voluntarily recalled. *Rice v. Morton*, 19 Mo. 263; *Ferguson v. Turner*, 7 Mo. 497. It cannot be doubted that the

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principle equally applies where the creditor, after having reduced his claim to judgment, takes a chattel mortgage from the principal debtor with the view of exonerating the other judgment debtor who is a surety. The principle stated by Mr. Commissioner PHILIPS, in dealing with this subject, is quite applicable to such a case: "Where, of his own motion, and especially at the instance of any of the co-debtors, for his protection, the creditor obtains a special security or lien on the property of one of the joint debtors, equity and good faith impose on him a trust duty to preserve the lien for the protection of the other surety, in order that his right of contribution may be secured to him." *Lower v. Bank*, 78 Mo. 67, 71. It can make no difference with the operation of the principle what species of lien or special security the creditor takes of the principal debtor or of one of the cosureties.

But we take it that this principle cannot be invoked so as to help out the plaintiff on the state of facts disclosed by this evidence. The principle, which runs through all the cases above cited, and all the cases on the subject with which we are acquainted, is that, while the creditor is not bound to put himself to any trouble, or to do any affirmative act for the purpose of helping out the surety, except in cases under the statute where the surety may call upon him to bring suit, yet, if he does do some affirmative act by which he secures a valid lien or security upon the property of the principal debtor, then he is bound to hold on to that lien or security; and, if by another affirmative act he releases it, he exonerates the surety. But he is bound to do no more than merely to hold on to it. Having exerted himself in getting it, he is not bound to put himself to any further exertion in order to enforce it. We know of no case where it is *held* that, if by his mere negligence or non-action the lien or security becomes fruitless, this

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releases the surety. It is indeed *said* by Judge NORTON, in giving the opinion of the court in *Priest v. Watson*, 75 Mo. 315, that, "if the payee has a specific lien on the property of the debtor sufficient to satisfy the debt, and voluntarily surrenders the lien or loses it by his own neglect, the surety will be discharged." But it is evident that in this *dictum* the learned judge was not using language with his usual care. He seems to have been misled into the expression by following the language of the syllabus in *Ferguson v. Turner*, 7 Mo. 497. That syllabus does not correctly state the doctrine of the court. In that case the creditor had reduced his demand to judgment, and had sued out an execution and placed it in the hands of the sheriff, and the principal debtor had property subject to this execution, amply sufficient to satisfy it. Nevertheless, before the return day, the creditor, at the instance of the principal debtor, directed the writ to be returned unsatisfied, and took a deed of trust upon the property of the principal debtor, thus subject to the execution, to secure the payment of the judgment within four months from the date of the deed. This deed the creditor neglected to have recorded; and in a short time thereafter the whole property of the principal debtor, including that covered by this deed, was swept away by other executions. The court held that the surety was released, not because of the neglect of the creditor to have the deed of trust recorded, but because of his affirmative act in causing the execution, which had become a specific lien upon the property, to be returned unsatisfied. NAPTON, J., said: "They surrendered a specific lien, by which the debt was perfectly secure, and without consent of the surety. Shall they, after such conduct, be permitted to go upon the security? Admitting the deed of trust was a perfect nullity, and so it was for all valuable purposes, they had chosen to sue the debtor, which

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they were not obliged to do, and had prosecuted that suit to judgment. Execution had issued, and was in the hands of the sheriff a lien upon the personal property of the debtor. This lien they voluntarily discharged, without consideration. This they had no right to do. The security, so soon as the lien of the execution attached, was interested in the retention of that lien, and the discharge of the lien discharged the security."

So, in the case in which Judge NORTON used the inaccurate expression above quoted, the holder of a negotiable promissory note had reduced it to judgment against the maker, and had caused execution under the judgment to be levied upon property of the maker sufficient to pay the debt, and afterwards voluntarily released the levy without the consent of one who was an accommodation indorser, and consequently a surety upon the paper. It was held that this operated to release the indorser. He was not released by reason of the negligence of the creditor in failing to go forward and do some further affirmative act to enforce the lien which he had obtained by his levy; but he was released by reason of the affirmative and voluntary act of the creditor in releasing that levy, which the surety had a right to have retained for his own benefit and exoneration. We must, therefore, take it that, as Wilson acting for the defendant did no affirmative act to release or discharge the lien of the chattel mortgage, but merely neglected to go forward and constitute himself the active agent or trustee of the surety for the purpose of enforcing it, the surety has not been discharged under the principle of law which he invokes. He knew of the existence of the mortgage; he knew when the principal debtor threshed his wheat. He might then have paid the debt, which he stood under a legal obligation to pay, and might have demanded that the mortgage be

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assigned to him, and might have proceeded under it by seizing the wheat. Having failed to do this, he cannot upon any principle with which we are acquainted cast upon the creditor the loss which happened through the misconduct of the principal debtor. When it is said that, in such a case, the creditor, by taking additional security or acquiring a lien, constitutes himself a trustee for the surety in order to preserve for his benefit the advantage thus gained, it is not meant that he constitutes himself an active trustee, in the sense of being obliged to go forward and take any other affirmative steps for the benefit of the surety. The meaning is that he can go forward as far as he wishes, but that, having by going forward acquired any advantage, he cannot voluntarily go backward and surrender it.

The judgment of the circuit court will be reversed. All the judges concur.

THE STATE OF MISSOURI, Respondent, v. WILLIAM MEAGHER, Appellant.

St. Louis Court of Appeals, May 3, 1892.

1. **Criminal Law:** SALE OF INTOXICATING LIQUORS BY LICENSED DRAMSHOP KEEPER ON SUNDAY: INDICTMENT. An indictment for the sale of intoxicating liquors by a licensed dramshop keeper at his dramshop on a Sunday is good, if it follows the language of the statute in charging the offense.

2. ———: PLEADING IN PROSECUTION FOR MISDEMEANOR. When a defendant, after pleading not guilty to an indictment for a misdemeanor, by leave of court demurs to the indictment, the demurrer has not the effect of withdrawing the plea, and, therefore, the defendant need not enter a new plea after the demurrer is overruled.

3. ———: UNLAWFUL SALE OF INTOXICATING LIQUORS: BURDEN OF PROOF. In order to convict a defendant for the unlawful selling of intoxicating liquors, when the sale is not made by him in person, but by some one else on the defendant's premises, the state must show that the

person making the sale was the agent or employe of the defendant. But, when it appears that the liquor was sold by a person employed by the defendant to sell liquor for him at the particular place, and that the sale took place in violation of the statute, then a *prima facie* case is made out against the defendant, which he must rebut by showing that, in making the sale, his agent acted either without authority or contrary to his orders.

4. ———: KEEPING LICENSED DRAMSHOP OPEN ON SUNDAY: SUFFICIENCY OF THE EVIDENCE. The evidence in this cause is considered, and *held* sufficient to warrant the conviction of the defendant, a licensed dramshop keeper, for keeping his dramshop open and selling intoxicating liquors therein on a Sunday, though he was not present in person.

5. ———: ———: PURPOSE OF DEFENDANT. It is immaterial for wha purpose the defendant in such a cause goes to his dramshop, if he opens the place so that customers can come in, and sells intoxicating liquors there after they have come in on a Sunday.

6. ———: PROSECUTION FOR MISDEMEANOR: INSTRUCTING JURY IN ABSENCE OF DEFENDANT AND HIS COUNSEL. It is error for the trial court in a criminal cause, after the argument of the cause and in the absence of the defendant and his counsel, to give to the jury an additional instruction, though this is done in open court; and a judgment convicting the defendant must be reversed therefor, unless it clearly appears that such additional instruction wrought no prejudice to him. And *held*, that a reversal should result therefrom in this cause, though the additional instruction could properly have been given in the first instance.

Appeal from the Barry Circuit Court.—HON. JOSEPH CRAVENS, Judge.

REVERSED AND REMANDED.

W. C. Cloud, for appellant.

No brief filed for respondent.

THOMPSON, J.—The defendant, a licensed dramshop keeper, was indicted under section 4590 of the Revised Statutes, for selling intoxicating liquor in his dramshop on Sunday. He was convicted, sentenced to pay a fine of $50, and prosecutes this appeal to this court. So much of the statute as is material is as follows: "Any person having a license as a dramshop

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keeper, who shall keep open such dramshop, or shall sell, give away, or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxcating liquors in any quantity, on the first day of the week, commonly called Sunday, * * * shall, upon conviction thereof, be punished by a fine not less than $50, nor more than $200, shall forfeit such license," etc. The indictment, following the language of the statute, charged that at a day and place named the defendant, "then and there being a dramshop keeper, and having a license to keep a dramshop, did then and there unlawfully and wilfully keep open such dramshop, and sell and give away, and suffer to be sold and given away and otherwise disposed of, upon and about his premises and dramshop intoxicating liquors, to-wit, one glass of whiskey and one glass of beer, on the first day of the week, commonly called Sunday, contrary to the form of the statute," etc.

The state gave evidence by two witnesses tending to show that these two witnesses went into the back door of the defendant's saloon on a certain Sunday, and that one of the witnesses purchased for the sum of ten cents from one Tom Feehan two glasses of beer, which the witnesses drank upon the counter; that the front door was closed, but there were other persons in the saloon besides Feehan, and besides some men who were scrubbing the floor and cleaning the glasses. We do not gather from the testimony of these two witnesses that Feehan was the bar-tender for the defendant, or that he was employed by the defendant in any way; but, if the evidence for the state was defective in this regard, the evidence for the defendant helped it out by showing that Feehan was the regularly employed bartender of the defendant, having general charge of the saloon; that Feehan had been tending bar for the defendant for a long time, and that defendant had

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largely given up the business to Feehan to handle for him. On the contrary, the defendant by himself and by Feehan gave evidence tending to show that Feehan was under strict orders not to keep open the saloon and not to sell intoxicating liquor therein on Sunday, but that it was the custom of Feehan, in the discharge of his employment, to go into the place every Sunday for the purpose of cleaning it out,—scrubbing the floors, mirrors, cleansing the glasses, etc.

The errors assigned are: *First.* Failing to sustain a demurrer to the indictment. We overrule this assignment of error with the observation that it is not argued, and that in our opinion the indictment, following as it does the language of the statute, is perfectly good. *Second.* Putting the defendant on trial without a plea being entered. This assignment of error is not borne out by the record. As stated in the printed argument filed by counsel for the defendant, it is that the defendant specifically withdrew his plea of not guilty by leave of the court, in order to file his demurrer to the indictment, which demurrer was afterwards overruled; and upon this premise an argument is built that the overruling of the demurrer did not operate to reinstate the plea of not guilty which had been specifically withdrawn. Unfortunately for this argument the premise on which it proceeds is not borne out by the record. The record shows that, on August 13, 1890, the defendant pleaded not guilty to the indictment, and that afterwards at a subsequent term, to-wit, on the sixteenth day of April, 1891, he demurred to the indictment by leave of the court; but the record does not state that he withdrew his plea of not guilty. It is substantially admitted that, if this had been a prosecution for a felony, the subsequent demurrer to the indictment by leave of the court would not have the effect of withdrawing the plea of not guilty; since, as was held by the supreme court

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of this state in *State v. Reeves*, 97 Mo. 672, in felony cases the accused may plead not guilty, and demur to the indictment at the same time, and, upon the indictment being held sufficient in law, he will be triable on his pending plea of not guilty, just as though no demurrer had been interposed. While it is stated, *arguendo*, in that case, that the rule as to felonies in this respect did not cover misdemeanors,—and such upon the authorities cited was the common law,—yet it being the evident policy of our code of criminal procedure to assimilate the rules of procedure and make them uniform in all cases, whether of felony or misdemeanor, as far as practicable, and it being its policy, moreover, that persons who are guilty of public offenses shall not escape punishment upon bare technicalities which have no relation whatever to the merits of their prosecution or defense, we have no difficulty in overruling this assignment of error. If a defendant in a capital case could not successfully avail himself of this technicality it is not perceived on what sound principle he could do so, where he is punishable only by a pecuniary fine and the forfeiture of a privilege.

The third assignment of error questions the action of the trial court in failing to sustain the defendant's demurrer to the evidence. This demurrer was interposed at the close of the plaintiff's evidence, but was not renewed at the close of defendant's evidence. Although the state may have failed to make out a case by the evidence of its own witnesses, so that the court may have committed error in not directing the jury at the close of the state's evidence to acquit the defendant, yet we have seen that the defendant gave evidence supplying the omission of the state's evidence in this respect. While the defendant did not renew this so-called demurrer to the evidence at the close of the whole case, yet, he did in his motion for new trial,

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make the assignment that the verdict was against the evidence. We apprehend that this sufficiently challenges the legal effect of the whole evidence, assuming it to be true in so far as it works in favor of the state to justify a conviction.

We are of opinion that the evidence, taken altogether, was sufficient to justify a conviction. The law of this state as to the evidence which is necessary to convict for the unlawful selling of intoxicating liquors, where the sale is not made by the defendant in person, but is made by some one else, in contravention of the statute under which the indictment is framed, in the defendant's dramshop, drug store or other place of business is well-settled. That rule is, on the one hand, that in such a case it is necessary for the state to go farther than merely to show that some one in the defendant's place of business sold the liquor under conditions prohibited by the statute; and that it is necessary to show that the person doing the act was the agent or employe of the defendant. *State v. Baker*, 71 Mo. 475; *State v. Quinn*, 40 Mo. App. 573. In the case last named it was held by this court that evidence, that a person sold a glass of whiskey in the defendant's drug store under conditions prohibited by the statute under which the indictment was drawn, was not sufficient to support a conviction, in the absence of evidence that he was in charge of the store or serving customers, or that he was in the general or temporary employment of the defendant. Such evidence, in the view of this court, was entirely consistent with the conclusion that the act may have been done by an unauthorized and officious person. So, in the case before us, if we were at liberty to suppose that the beer had been sold by one of the men temporarily employed to scrub the floor on the Sunday named, who had not been employed by the defendant for the purpose of selling liquor at all, or

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authorized by him so to do, it might be regarded as an officious act, within the doctrine of the last-cited case. But it is settled by a considerable concurrence of judicial decisions in this state that, where the liquor is sold by the persons employed by the defendant to sell liquor for him at the particular place, and the sale takes place in violation of the statute, then a *prima facie* case is made out against the defendant, which he must rebut by showing that, in making the sale, his agent acted either without authority or contrary to his orders. *State v. Baker*, 71 Mo. 475; *State v. Reiley*, 75 Mo. 521; *State v. Heckler*, 81 Mo. 417, 420; *Casey v. State*, 6 Mo. 646; *Town of Kirkwood v. Autenrieth*, 11 Mo. App. 515; *Town of Kirkwood v. Autenrieth*, 21 Mo. App. 73; *State v. Durken*, 23 Mo. App. 387.

In applying the doctrine of these cases to the case before us, it is to be observed that here the statute prohibits the dramshop keeper from keeping his dramshop open, or from selling, giving away or otherwise disposing of, *or suffering the same to be done*, upon or about his premises, any intoxicating liquor, in any quantity, on the first day of the week commonly called Sunday, etc. The statute is in the nature of a police regulation enforced by penal sanctions, imposing upon licensed dramshop keepers the affirmative duty of keeping their dramshops closed on Sunday, and of not selling or giving away or otherwise disposing of any intoxicating liquors therein on that day, or of suffering anyone else to commit the like acts in their dramshops on that day. And this is made a condition upon which the right of retention of his license as a dramshop keeper depends. A dramshop is kept open within the meaning of this statute when the back door of it is left open, so that the public may enter, although the front door is closed. In this case the evidence shows that the two persons, who

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procured and drank the beer in the defendant's dramshop, on the Sunday named, entered through the back door without obstruction or objection from anyone for the purpose of procuring intoxicating liquor therein, which they did procure. This made out a *prima facie* case against the defendant of keeping his dramshop open contrary to the form of the statute, and as charged in the indictment. When the evidence went further, and showed that one of these persons purchased a "treat" for the two, consisting of two glasses of beer, from a man who had long been the defendant's bar-tender in charge of his saloon business there, and to whom he had very largely committed the management of his business, and that this man received pay for the same, and that the beer was drank upon the counter, it made a very clear *prima facie* case against the defendant of selling intoxicating liquor in his dramshop on Sunday contrary to the form of the statute and the charge in the indictment.

To rebut this *prima facie* case, the defendant gave his own evidence and that of his bar-tender, to the effect that the bar-tender was under orders not to open the dramshop on Sunday and not to sell any intoxicating liquors therein. This evidence was delivered from the mouths of interested witnesses; the defendant was strongly interested in not suffering a conviction which would involve a pecuniary fine and the forfeiture of his license as a dramshop keeper; and it may reasonably be presumed that Feehan was interested in preventing the dramshop from being closed, whereby he would lose his situation as the manager of it in the employment of the defendant. It was, therefore, for the jury to say whether or not they would believe the testimony of these witnesses and exonerate the defendant. It is very clear from these observations that the court committed

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no error in submitting the case to the jury, and that the verdict is sustained by substantial evidence.

The next assignment of error questions the propriety of all the instructions given at the request of the state. As some of these instructions were undoubtedly good, we have some difficulty in determining the one at which this objection is leveled; but from the argument adduced in support of it we assume it to be the following: "If you find that the bar-tender or clerk of the defendant did, on Sunday, the third day of August, 1890, in Lawrence county, Missouri, sell two glasses of beer to the witnesses in this case, such selling would be the act of the defendant in contemplation of law, and you will convict him of the charge in this indictment in this case, unless you believe said sale was made by said bar-tender or clerk without the knowledge or consent of the defendant; and against his orders and directions given by him to his said clerk or bar-tender." Then followed the usual cautionary instruction in favor of the defendant on the subject of reasonable doubt. The instruction above quoted appears to have been well drawn in conformity with the settled rule of evidence in this state hereinbefore stated.

The next assignment of error relates to the action of the court in refusing certain instructions requested by the defendant. One of these was as follows: "If you believe that the witness, Thomas Feehan, was at defendant's place of business on Sunday, the third day of August, 1890, for the purpose only of cleaning out the saloon, and not for the purpose of selling liquor, and sold the beer mentioned in these instructions, *or* sold it against the express instructions of the defendant, then you will find the defendant not guilty." This instruction was erroneous in point of law. It authorized the jury to find the defendant not guilty, provided the defendant's bar-tender, who upon the defendant's

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own evidence had, in a large degree, the management of the business, merely went to the defendant's place of business on the day named, for the purpose of scrubbing out the place, and not for the purpose of selling liquor. We take it that it was quite immaterial for what purpose he went there, if he opened the place so that customers could come in, and if he sold liquor to them when he was there, and after they had come in, on Sunday. It is to be observed that the other portion of the instruction in regard to his selling it against the express instructions of the defendant is drawn in the alternative, and does not help out the vice of the preceding portion.

The next of these refused instructions is as follows: "The court instructs the jury to find the defendant not guilty, if they believe from the evidence that Thomas Feehan was present at defendant's place of business on the third day of August for the purpose of scrubbing out the same, and not for the purpose of selling liquors, although they may further believe from the evidence that Thomas Feehan did sell the beer on Sunday, provided the jury further believe that the defendant did not authorize liquors to be sold by said Feehan to witnesses Pruitt and Atkinson, or any other person, on this Sunday." This instruction was likewise misleading, because it made the immaterial question of the purpose which Feehan had in going down to the saloon on the Sunday in question a material hypothesis for the jury to consider. In the instruction for the state, above quoted, the court had covered the law of the case, as presented by the evidence, in a manner sufficiently clear and sufficiently favorable both to the state and the accused. Under that instruction the jury could not misunderstand that it was their duty in the premises to acquit the defendant, unless they should find that, in selling the beer to the state's witnesses, Feehan had

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acted without the knowledge or consent or against the orders and directions of the defendant.

The last assignment of error presents the only close question in the case. After being instructed by the court, the jury retired to consider of their verdict at about seven o'clock in the evening. After being out until about noon of the following day, the court had the jury brought into court in the absence of defendant and his counsel, and, without their knowledge or consent, and gave them the following additional instruction: "You are the sole judges of the weight of the evidence and of the credibility of the witnesses; and, if you believe that any witness has testified wilfully false as to any material fact in the case, you are at liberty to disregard any part or the whole of the testimony of such witness. In determining the amount of credit to be given any witness, you may take into consideration his or their relation to the case, and the interest they may have in the result of the trial." To this the defendant by his counsel excepted as soon as he saw the instruction, which was after the jury had agreed upon their verdict, and returned the instruction with their verdict into court.

We believe that it is a general rule of procedure, *where not modified by statute*, that it lies within the sound discretion of the trial court to recall the jury at any time during their deliberations, and to give them any additional instructions which in the judgment of the court the case may require, though there is a mass of authority, which we need not cite, to the effect that the judge cannot give the jury supplemental instructions in the form of sending such instructions in writing to their room—the principle being that, when he gives them further instructions, or otherwise communicates with them, except to inquire whether they have agreed upon their verdict, he must do it *in open court* where

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the counsel for the parties have an opportunity to be present and take such action in reference to the action of the court as to them may seem proper; and, further, that, in such a case, it is not obligatory upon the court to send for the parties or their counsel, but that, if they wish to be present on such occasions, it is their duty to remain in court. At the same time it is conceded that the courts ought to endeavor, as matter of proper courtesy, at least, to secure the attendance of counsel before reinstructing the jury. In *Chapman v. Railroad*, 26 Wis. 295; s. c., 7 Am. Rep. 81, it was ruled that where, after the jury have retired to consider of their verdict, they come into court and desire information on a particular point, and the court thereupon, conforming to their desire, gives them an instruction in writing, in the absence of the unsuccessful party and his counsel, and without sending for them, no error is committed. The court hold that it is a matter of grace or favor on the part of the trial court to send for the absent party or his counsel, and not a legal obligation or duty. This decision has been followed by the supreme court of New York in *Cornish v. Graff*, 36 Hun, 160; and in New Hampshire and South Carolina it has been held that the judge may communicate with the jury after the adjournment of the court upon their request, so far as to give them instructions upon matters of law, although counsel are absent, without affording ground for a new trial. *Bassett v. Salisbury*, 28 N. H. 457; *Goldsmith v. Solomons*, 2 Strobh. (S. C.) 296. On the other hand, in California, where the practice is regulated by statute, the rule is different. *Redman v. Gulnac*, 5 Cal. 148 (civil case); *People v. Trim*, 37 Cal. 276 (criminal case).

In this state the subject is obviously influenced by the statute, which requires the court to instruct the jury in writing, on motion of either party, before the

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case is argued or submitted to them. In *Burns v. Wilson,* 1 Mo. App. 179, after the argument and submission of the cause, the court upon a request from the jury gave them an additional instruction, the defendant, against whom their verdict was subsequently rendered, objecting and excepting to the action. This court, proceeding on the view that this was a deprivation of the right of the defendant, through his counsel, to *argue* to the jury the application of the proposition of law contained in this instruction to the facts of the case, held that it was error, and could not say that the error was not prejudicial as the instruction was not set out in the bill of exceptions. In that case the counsel of the objecting party appears to have been present when the additional instruction was given, and does not appear to have preferred any request to the court to be allowed to make an additional argument upon the application to the evidence of the proposition of law contained in that instruction; and in framing his bill of exceptions he did not see fit to embody the instruction therein. I am prepared to say for myself that that case was not well decided, and that I would not agree to follow it. It is the duty of the appellant to show not only error, but prejudicial error; and where he sees fit to omit something from his bill of exceptions, which, if inserted therein, might show that the error complained of was merely technical and not prejudicial, I am prepared to say for myself that he does not show a right to a reversal of the judgment. I am further of opinion that, where the counsel for the complaining party is in court at the time when an additional instruction is given, it cannot be regarded that the giving of it deprives him of the right of argument conceded to him by the statute, unless he requests the right of making an additional argument.

In *Chinn v. Davis*, 21 Mo. App. 363, the trial court

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held a communication with the foreman of the jury, the latter having come into the court for the purpose, leaving his fellows in the jury room, to which they had retired to consider of their verdict. This communication was held in a whisper, and was inaudible to the counsel who represented the unsuccessful party. As the successful party made no effort to show, by the affidavit of the foreman of the jury or otherwise, what this communication was, it was held that the legal suspicion which attached to it had not been removed, and that a new trial must be granted. But it is perceived that that case falls within the numerous class of cases already spoken of, which relate to *secret communications* between the judge and the jury, which are generally held ground of new trial.

In *Chouteau v. Iron Works*, 94 Mo. 388, 400, a new trial was ordered because of a communication between the judge and the jury, which took place neither in open court nor in the presence of the parties, but in the room of the judge. The circumstances attending it are thus stated by Black, J., in giving the opinion of the court: "After a trial, lasting about four days, the cause was submitted to the jury at two o'clock in the afternoon. The jurors were unable to agree on that day, and so reported to the court. They were discharged until the next day, with the usual caution. Upon the opening of the court for that day, the jurors took their seats, and the court inquired whether their difficulty in reaching a verdict arose from matters of fact or law. One juror answered, from matter of law, and another from matter of fact. The third desired to state the point of difference, but, counsel not being willing that he should do so, the jurors were sent to their room with instructions from the court that if they desired further instructions, as to any point of law, to make their request known in

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writing after retiring to their room. Thus far counsel for both parties were present and heard what was said. The court was not adjourned, but the judge left the bench and went to his room, which is described as being a part of the court room. Counsel for both sides left the court room. In three quarters of an hour from the time the jurors went to their room, they addressed two written notes to the judge, the first asking him if it would be consistent for the jurors, who were in favor of the defendant, to consent to a verdict for plaintiff for a nominal sum; and the second being a report that they could not agree. To these communications, the judge made no answer. Subsequently, and while the judge was in his room and counsel were absent, the jurors wrote out the following questions and sent it to the judge by the bailiff: 'Would it be consistent with the instructions of the court to find for plaintiff with nominal damage?' To which the judge in writing made the following answer, and sent it and the question to the jury room by the bailiff: 'It would be consistent to find nominal damages, provided the jury are of the opinion, from the evidence, that there was no substantial damage sustained by the plaintiff in consequence of the breach of the contract, if there was a breach.' Within half an hour the jury returned a verdict for plaintiff with one cent damages. After the additional instruction had been sent to the jury, and before they returned with their verdict, one of the attorneys for the plaintiff returned to the court room, and, upon making some inquiry of the clerk, was by him informed that the jury had sent in a question to the court which had been answered, or that the jury had sent in a request for further instructions, and that they had been given. Aside from this, counsel knew nothing of what had transpired." Although the court, aside from this

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irregularity, regarded the case as having been well tried, although it was a second trial, although there was substantial evidence from which the jury might have found that the plaintiff sustained no substantial damage; and although it was conceded that the action of the court was done with the best intention, yet the supreme court felt bound to reverse the judgment and order a new trial. BLACK, J., made these pertinent observations: "It is the province and duty of the trial court to aid the jury by giving them proper instructions; and if they do not understand the instructions given, or if some point about which they should be instructed has been overlooked, or some mistake made in the instructions given, the jury may be called to the bar of the court and proper instructions may be given. This is but a common-sense view of the matter, and so, in part, at least, it was held in *Dowzelot v. Rawlings*, 58 Mo. 75. But to sustain this verdict we must say that a court in session may, at the request of a retired jury, send to them in their room additional instructions without the knowledge of the parties litigant, or their attorneys, and without an opportunity of being heard. This we cannot do without opening wide the door to abuses that must follow in the train of such a precedent. Our statute contemplates that all instructions to the jury will be given in open court with an opportunity to counsel to be heard, and take exceptions, if they like, to such as are given, and the practice is to do this at the time, or the objection will be of no avail when the case comes here for review." 94 Mo. 403, 404.

In *Dowzelot v. Rawlings*, referred to by BLACK, J., in the quotation just made, the supreme court of this state said that "there may be instances when it will become the imperative duty of a court to rectify some omission, or cure some oversight, by giving to the jury an additional instruction * * * after their retire-

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ment." The circumstances, under which the jury were recalled and the additional instruction given in the last-named case, are not set out in the report or the opinion. It was merely held that there was no error in the act of recalling the jury and giving them the instruction, though there was error in the form of the instruction itself. 58 Mo. 78. A similar ruling was made by the supreme court in the earlier case of *Cluskey v. St. Louis*, 50 Mo. 89, where, after the close of the argument, the court, at the request of the defendant, who was afterwards successful, withdrew, by an instruction, from the jury a written contract which had been put in evidence. The supreme court held it no error for which a new trial could be granted, saying that the withdrawal "could have done the plaintiff no harm,—if it had any effect at all, it was in his favor."

These are all civil cases. In *State v. Alexander*, 66 Mo. 148, the defendant was put upon trial under an indictment for murder in the first degree, and the judge held certain *private communications* with the jurors, which the supreme court rebuked in strong language, holding that that constituted ground for new trial. Among other things, one of the jury sent a note to the judge containing this inquiry: "Will the law apply in this case as in dueling?" The judge wrote on the note: "See instructions 10, 11 and 12," and sent it by the bailiff to the jury. The judge made other private communications with members of the jury, which we need not specify. It is perceived that this case rests upon the footing of private communications made between the judge and particular jurors, and the observation of the supreme court seems to have been well warranted, that "the jury are the triers of the facts, and the court has no more right to interfere with them while considering of their verdict, except in open court to discharge them from time to time, or, in the presence of the

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accused or his counsel, to instruct them as to the law of the case, than the jury have to invade the province of the court." 66 Mo. 164. In *Norton v. Dorsey*, 65 Mo. 376, the report does not show whether the prosecution was for a felony or a misdemeanor. The case was tried before a special judge. After the jury retired to consider of their verdict, the special judge "called the jury into the court room, a little after dark in the evening, and in the absence of the parties and their attorneys, and all other persons being excluded from the court room except the deputy sheriff," gave to the jury additional instructions, which were embodied in the bill of exceptions." This was held ground for new trial. The court, speaking through HENRY, J., and referring to its decision in the case last cited, said: "This question was before us at the present term in the case of *State v. Alexander*, and we held that such conduct on the part of the court was a sufficient ground for reversing its judgment. The court should never, even in open court, in the absence of the parties and their attorneys, when it is practicable to have them present, give additional instructions or modify those already given. No reason is shown, why in this instance it was done in their absence, and the fact stated in the bill of exceptions, that all persons except the deputy sheriff were excluded from the court room, excites suspicion, which, in its conduct, the court should be careful to prevent from attaching to its proceedings." It further appeared that the court refused to sign a bill of exceptions containing the above statement, and that such a bill was signed by bystanders under the statute.

From the foregoing decisions of our supreme court we must conclude that the ruling now under consideration is ground for new trial, unless we can plainly see that it wrought no prejudice to the defendant. The

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court had already given, when the jury were first instructed, the following cautionary instruction: "The defendant is a competent witness to testify in his own behalf; but the fact that he is the accused party on trial may be considered by you in determining the amount of credit to be given to his testimony." The cautionary instruction, which the court gave on recalling the jury, was one which the court might properly have given in a case of this kind, where more or less doubt attached to the credit of all the witnesses, both those for the state and those for the defendant. *State v. Mix*, 15 Mo. 153; *State v. Dwire*, 25 Mo. 553. The giving of such an instruction has often been approved in this state, and the meaning of it merely is, when applied to the testimony of witnesses in jury trials, that, if any witness has wilfully or intentionally sworn falsely to a material fact in controversy on the trial, the jury are at liberty, if they shall think proper, to reject the whole of his testimony, though they are not bound to do so, but may give to it such weight as they think it is entitled to. *Gillett v. Wimer*, 23 Mo. 77; *Kelly v. Express Co.*, 45 Mo. 428; *Paulette v. Brown*, 40 Mo. 52; *Brown v. Railroad*, 66 Mo. 588; *State v. Gee*, 85 Mo. 647. It is a cautionary instruction which is very commonly given in jury trials in other jurisdictions. A limitation upon the giving of it is, that it is error to single out a particular witness, and to direct such a cautionary instruction, although couched in proper terms, against his testimony. The reason is that such a course tends to convey to the minds of the jurors the impression that the testimony of the particular witness is disbelieved by the judge, and is to be disregarded, which question is within their province, and not within his. *State v. Stout*, 31 Mo. 406; *State v. Cushing*, 29 Mo. 215, 217. This is especially true, where there is nothing in the testimony of the particu-

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lar witness which requires such a caution. *State v. McDevitt*, 69 Iowa, 549.

As the instruction in this case did not single out the testimony of any particular witness, and direct the caution to that, but as the jury might have regarded it as applying to the testimony of either of the witnesses for the state, or to that of either of the witnesses for the defense, there is some difficulty in seeing in what manner the defendant could have been prejudiced by the giving of it. If it had been given with the other instructions, and he had saved an exception thereto, the exception would have been unavailing, for there would have been no error; from which we must conclude that the mere fact, that it was given when he and his counsel were out of court, so that they did not have an opportunity to except to it at the time, does not show that the defendant sustained any prejudice through the giving of it. But it did give information to the jurors of a rule, which they were at liberty to apply in resolving the doubts which had evidently arisen in their minds in regard to the credibility of the witnesses. The giving of such an instruction is not at all obligatory upon the court, even in a criminal case, without request; and, where it is given, the fact that it is given, may materially influence the course of argument which counsel may wish to make upon the facts before the jury. We can hardly understand that so important an instruction could be given to the jury after the argument had been closed without reopening to the defendant, upon request, his right of again arguing the facts to the jury in the light of the instructions; but, as he was out of court when it was given, he had no opportunity to prefer such a request.

In all cases of felony it is absolutely essential that the accused should be present in court at every stage of the trial, and that the record should affirmatively show

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that fact. *State v. Smith*, 90 Mo. 37; *State v. Barnett*, 63 Mo. 300; *State v. Able*, 65 Mo. 37; *State v. Dooley*, 64 Mo. 146; *State v. Barnes*, 59 Mo. 154; *State v. Hoffman*, 78 Mo. 256. In such a case, our supreme court, affirming the power of the trial court to give the jury additional instructions, when they returned into court, in open court and in presence of counsel for the defendant, have held that, "in the absence of any showing to the contrary, if such presence were necessary, it will be presumed that the trial court did its duty, and that the accused was present." This refers to the personal presence of the accused, and not merely to his right to be present either by himself or counsel. While the rule is not so strict in cases of misdemeanor as to require the personal presence of the accused, where the punishment does not extend to imprisonment (*State v. Geiger*, 45 Mo. App. 111; *In re Miller*, 44 Mo. App. 125; *State v. Glassner*, 7 Mo. App. 572); yet, even in such cases, he must be present at least by attorney. In view of this principle; in view of the above expressions of our supreme court on the subject of the judge holding communications with the jury in the absence of counsel; and in view of the provisions of our statute, which gives the right of argument to the jury after the instructions have been given to them, we must, on the whole, conclude that the court committed error in this case in giving the jury the additional instruction in the absence of the defendant and his counsel, and we accordingly reverse the judgment and remand the case. It is so ordered. All the judges concur.

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MARTHA E. ADAMS, Appellant, v. FRANCIS M. ADAMS, Respondent.

St. Louis Court of Appeals, May 3, 1892.

1. **Alimony:** RIGHT OF APPEAL FROM ORDER OF REFUSAL. An appeal lies from an order overruling a motion for alimony.

2. **Right of Court to Grant Alimony After Judgment.** Alimony to defray counsel fees may be allowed after final judgment in the cause, when the motion therefor is filed prior to the trial, but as a matter of convenience is heard with the issues in the cause.

3. **Alimony to Defray Counsel Fees:** PRACTICE, APPELLATE: PRESUMPTIONS IN FAVOR OF JUDGMENT OF TRIAL COURT. The allowance of such alimony is not a matter of right under all circumstances, but facts may appear at the hearing of the application therefor which will justify the refusal of it. Accordingly, an order refusing it cannot be reviewed, when it does not appear what evidence was developed as to the merits of the application at the hearing thereof; since, in such case, it cannot be said that the trial court abused its discretion in the premises

Appeal from Washington Circuit Court.—HON. J. F. GREEN, Judge.

AFFIRMED.

Anthony & Eversole, *Wm. F. Carter* and *Martin L. Clardy*, for appellant.

(1) The court erred in refusing to consider and in dismissing the motion for alimony. Alimony *pendente lite* is allowed as a matter of course upon proof of marriage and pendency of the suit. *Smith v. Smith*, 2 Phill. 158; *Frith v. Frith*, 18 Ga. 272; 2 Bishop on Marriage & Divorce, sec. 387. Generally, whether alimony shall be allowed at all is a matter of law, and how much shall be allowed is a matter of sound discretion. *Methvin v. Methvin*, 60 Am. Dec. 664, and notes.

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While permanent alimony can only be granted as an incident to divorce, temporary alimony—sustenance of the wife and reasonable attorney's fees—is awarded almost as a matter of course, in order that the wife may stand before the tribunal, which administers one law alike to husband and wife, on an equal and common ground with him. Bishop on Marriage, & Divorce, *supra*. The plaintiff was entitled to have her motion considered by the court before the trial of the case, and the fact that, upon a suggestion of the court, she consented that its consideration might be postponed, did not affect her right to a reasonable allowance to meet the expenses of litigation already incurred. *McDonald v. Waggener*, 5 Mo. App. 58; *McEntyre v. McEntyre*, 80 Mo. 470. The dismissal of the bill and cross-bill did not operate as a dismissal of the motion for alimony; but it was the duty of the court to make an allowance to the plaintiff. *Waters v. Waters*, 49 Mo. 385. (2) It has been decided in this state (*State ex rel. v. Seddon*, 93 Mo. 520) that an order making an allowance for alimony *pendente lite* is a final order from which an appeal will lie, and it logically follows that an order dismissing an application for alimony is a final one, from which an appeal may be prosecuted.

Dinning & Byrns, for respondent.

(1) The power of the court to allow alimony "pending the suit for divorce" is not questioned, and the right to grant it in all cases where the same would be just is also conceded. But where the wife is plaintiff, the cause heard on its merits, and she denied a divorce, the court has no power to decree to the wife "suit-money"—money to pay the expenses of a litigation which has been adjudged by the court to be without merit. R. S. 1889, sec. 4505; *Dawson v. Dawson*,

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37 Mo. App. 212, *et seq.; State ex rel. v. Seddon*, 93 Mo. 522; *Wagner v. Wagner*, 34 Minn. 441; *Newman v. Newman*, 69 Ill. 167; *Wilde v. Wilde*, 2 Nev. 306; *Perry v. Perry*, 2 Barb. Chan. 285; *Krause v. Krause*, 23 Wis. 354; *Wood v. Wood*, 2 Paige, 454; *Chestnut v. Chestnut*, 77 Ill. 346; 2 Bishop on Marriage & Divorce [6 Ed.] sec. 416; Bishop on Marriage, Divorce & Separation, sec. 955; *Harvell v. Harvell*, 39 Ind. 185; *Dunn v. Dunn*, 13 P. D. 91. (2) Aside from the fact that the court had no authority to render a judgment for suit money against defendant on the day after the wife had been refused a divorce, the ruling of the court was right. No testimony introduced in support of the motion has been preserved, and the bill of exceptions filed herein does not pretend that the attorneys (five of them) for plaintiff have not been paid, nor do these gentlemen in their brief even assert that they have not been paid, nor did they, at the time the court decided the case and refused the plaintiff a divorce, complain or object or except, nor did they until the next day say one word about the motion for alimony.

Thompson, J.—This appeal is prosecuted by the plaintiff, who is a wife suing for divorce, from an order of the court overruling her motion for alimony *pendente lite*. We understand that it is not disputed that an appeal lies from such order. In *State ex rel. v. Seddon*, 93 Mo. 520, it was held that an order making an allowance of alimony *pendente lite* is appealable, and we assume that, where a motion is made for such alimony, the manner in which it is disposed of, whether in favor of the moving party or otherwise, cannot affect the right of appeal.

The record, which brings this question before us, does not set out the pleadings, nor the evidence adduced on the trial in chief; but it consists merely of a bill of

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exceptions, reciting that, on the twenty-fifth day of May, 1891, plaintiff filed her petition praying for a divorce on the ground of indignities, etc.; that service was duly had on that day; that afterwards, on the twenty-fourth day of August, 1891, the defendant filed his answer and cross-bill, charging in the cross-bill that the plaintiff had offered him such indignities as rendered his condition intolerable, which indignities were fully set out; that afterwards, on the twenty-fifth of August, 1891, the plaintiff, by leave of court, filed her amended petition, again averring that the defendant had offered her such indignities as rendered her condition intolerable; that thereafter, on the same day, the plaintiff filed her motion for alimony *pendente lite;* that this motion stated that the defendant was seized and possessed of a large property, real and personal, in the county, of the value of $40,000; and that the plaintiff had no property of any kind,—that she was without means for her own support, and wholly without means to prosecute the suit,—and praying for an allowance of a sufficient sum to enable her to prosecute her action, and for her support. The bill of exceptions further shows that on the same day, August 25, 1891, the defendant refiled his original answer and cross-bills as an answer and cross-bill to the amended petition; that the parties announcing themselves ready for trial, the plaintiff asked the court to take up and hear at that time the plaintiff's motion for alimony *pendente lite;* that the court then remarked that the whole matter,—the case upon the merits and the motion for alimony *pendente lite*,—could be heard at the same time, to which suggestion counsel for plaintiff acceded; that the cause was thereupon submitted to the court for trial; that the court, after a full hearing of all the testimony offered on the part of both plaintiff and defendant, and after having fully considered the same, adjudged that both the plaintiff's

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petition and the defendant's cross-bill be dismissed, and that the defendant pay all costs. The bill of exceptions further recites that, during the progress of the trial, it was fully shown by the testimony in the case that the plaintiff was not possessed of any property whatever, but that the defendant was seized and possessed of property of the value of $9,000. It was further shown by the testimony that the defendant had furnished the plaintiff with a home, and had fully provided for her up to the time of the trial, and that the plaintiff was represented in the case and at the trial by certain attorneys only five in number. But the bill of exceptions does not make it appear whether or not the home which the defendant had furnished the plaintiff was at the residence of the defendant or separate from his residence. After the dismissal of the petition and cross-bill by the court, as above stated, and on the following day the plaintiff called up her motion for alimony *pendente lite*, and asked the court to make the plaintiff a proper allowance. The court, after considering the same, refused to make the plaintiff any allowance, but ordered the motion to be overruled, to which order the plaintiff excepted and thereafter took an appeal to this court.

The evidence above recited excludes from consideration the subject of alimony so far as it relates to alimony proper, that is, alimony for the sustenance of the wife, because the evidence adduced on the trial, as above recited, shows that the husband supported the wife and furnished her a home down to the time of the trial, as we interpret it. This eliminates from the case the consideration of alimony proper, and leaves only for consideration the subject of the granting of that species of alimony known as *suit money*. The right to this kind of alimony does not rest on quite the same footing as alimony which consists of sustenance.

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Dawson v. Dawson, 37 Mo. App. 213. The right of sustenance is a right which the wife may lawfully claim of her husband under all circumstances, until it is judicially ascertained that she has forfeited it by her misconduct. This can seldom appear in an action for divorce, until the cause is heard in chief, and the final decree is entered. It is, therefore, almost a matter of course to allow the wife on a seasonable application this species of alimony, and the general rule is that the only question which is considered is the amount which ought to be awarded. In *State ex rel. v. Seddon*, 93 Mo. 520, an appeal was prosecuted from an order allowing the wife alimony in the nature of *sustenance* at the rate of $35 per month, and not from any order relating to *suit money*. In disposing of the question of the right of an appeal from such an order as was the subject of the appeal, the court, speaking through BRACE, J., said: "The power of the court to order and enforce an allowance for alimony *pendente lite* although an adjunct of the action of divorce, is an independent proceeding standing upon its own merits, and in no way dependent upon the merits of the issues in the divorce suit, or in any way affected by the final decree upon those merits." In *Dawson v. Dawson*, 37 Mo. App. 213, a distinction was taken between these two kinds of temporary alimony, this court holding that alimony *pendente lite*, in so far as it is granted to defray counsel fees and costs of suit, ceases at once upon the final ascertainment of the wife's guilt, but that such alimony in so far as it is allowed for the support and maintenance of the wife, unless vacated or modified, continues until the fact of dissolution by a final decree of divorce from the bonds of matrimony,—that is to say, it continues, as in that case, through successive appeals. But it is a necessary predicate to the right to this species of alimony, that it can only be granted while the suit is pending. Bishop

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on Marriage & Divorce, sec. 384. On the one hand, it cannot be granted before the defendant has been served by publication or otherwise, for until then the jurisdiction of the court does not attach. See cases cited to this proposition in Mr. Freeman's note, 60 Am. Dec. 673. On the other hand, after the cause has been heard on the merits and ended, no such award can be made, for then the jurisdiction of the court is determined. *Ibid.* There are necessary and reasonable qualifications to this rule. One is, that, where the husband is the plaintiff, he cannot defeat the right of the wife to such alimony by dismissing his suit, although he may thereby diminish the amount which will be awarded her. The court reasons thus: "If the friends of the wife gave her such credit as to enable her to properly appear in the suit, trusting to her ability to obtain an allowance to reimburse them after she had appeared and applied for the proper sum, the application is not only made pending the suit, but it would be a fraud upon her rights to permit the husband to defeat it by then dismissing the proceeding." *Waters v. Waters*, 49 Mo. 385, 389. We apprehend that the principle of that case governs the case before us, so far as the *jurisdiction* to make the order is concerned. The application for the alimony *pendente lite* was made pending the suit, and before the hearing on the merits. The hearing on the merits was about to be commenced. The learned judge naturally concluded that his discreation would be better guided in making the award, if such an award were proper, after hearing the merits than before, and he, therefore, suggested that the motion be heard together with the merits, to which counsel very properly acceded. The failure of the court to make any award at the time of entering the decree upon the merits, did not, we take it, determine its jurisdiction in the matter,—especially in the view of the

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supreme court in *State ex rel. v. Seddon*, as above quoted, that the application for such alimony is in the nature of a separate proceeding. We, therefore, hold that the court had the power, on the day following the decree, to make the award.

But we are unable to say from the disclosures in the record before us that the court erred in not making it.

Our understanding is that it was the practice of the English ecclesiastical courts, on an application for alimony *pendente lite*, in the nature of suit money, to hear affidavits, with the view of determining whether the action was prosecuted by the wife in good faith where she was the libelant, and whether upon probable cause. It may be conceded, on the careful reasoning of Judge Bliss in *Waters v. Waters*, 49 Mo. 385, that the court cannot try and determine the merits of the suit on the application of the wife for the means to prosecute the suit; since the very want of these means may prevent her from presenting the necessary evidence to show that she prosecutes it rightfully. We, therefore, apprehend that, where an application for alimony in the nature of suit money is made by a wife suing for a divorce it will be granted as a matter of course, unless certain things which preclude that right on settled law are made to appear. One of these is that the husband and wife are still living together in the same residence. It is settled law that the spouses must be living separately during the pendency of the suit for divorce, in order to warrant an award of alimony *pendente lite* in favor of the wife. On this point Dr. Bishop says: "It is legally improper for the parties to live in matrimonial cohabitation, whatever is to be the result of the suit. Even if the husband offers to support the wife in his own house, with separate beds, she should not accept the offer." 2 Bishop on Marriage & Divorce [5 Ed.] sec. 384. Numerous authorities

justify the statement of doctrine that, alimony being an allowance for a separated wife, granted upon the wrongful refusal of the husband to support her (*Garland v. Garland*, 50 Miss. 694, 716), the parties must be living separately in order to justify an allowance of alimony *pendente lite*. Stewart on Marriage & Divorce, secs. 383, 384; *Tayman v. Tayman*, 2 Md. Ch. 393; *Anshutz v. Anshutz*, 16 N. J. Eq. 162; *Quincy v. Quincy*, 10 N. H. 272; *Burns v. Burns*, 60 Ind. 259; *Battey v. Battey*, 1 R. I. 212. In the present case the bill of exceptions does not disclose whether it appeared in evidence that the wife was living with the husband during the pendency of the suit for divorce, or separately from him.

While, as already stated, it is a rule that alimony *pendente lite* is awarded. when the application is made prior to the final hearing, almost as a matter of course (*Methvin v. Methvin*, 15 Ga. 97; s. c., 60 Am. Dec. 664; cases cited in a note 60 Am. Dec. 674), yet it has been held that such alimony may be denied, where affidavits disclose misconduct so glaring as to make it clear that no aid should be given to the wife to prosecute her suit. *Fowler v. Fowler*, 4 Abb. Pr. (N. Y.) 411. Another court has held that, on a motion for such alimony upon bill, answer and affidavits taken on both sides, it is proper for the court to look into the merits of the case as thus far disclosed. *Begbie v. Begbie*, 7 N. J. Eq. 98. Another court holds that it must appear that the suit is instituted in good faith, and that it is not prosecuted merely for the purpose of obtaining money from the husband. *Kirrigan v. Kirrigan*, 15 N. J. Eq. 146. See, also, *Litowich v. Litowich*, 19 Kan. 451. Another court holds that, on such an application, the court should inquire as to the authority for bringing the suit, where there is a suspicion of the *bona fides* of the proceeding. *Swearingen v. Swearingen*, 18 Ga. 316. And,

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finally, it has been held that, where the case is brought to a hearing before any temporary alimony is ordered, —and that is this case,—the award should not then be made, if the case appears to be one where the plaintiff had no reasonable ground of suit. *Underwood v. Underwood*, 12 Fla. 434.

It seems clear to us that the foregoing disclosures of the bill of exceptions do not show that the court erred or abused its discretion in refusing to make the award of alimony *pendente lite* prayed for in the plaintiff's motion. It is to be kept in view, as conceded by the supreme court in *State ex rel. v. Seddon*, 93 Mo. 520, 523, that "such an order is largely *within the discretion* of the circuit judge, and would not be interfered with by the appellate court unless it was made clearly apparent that such discretion had been abused." It not only does not appear from the foregoing disclosure of facts that the discretion of the court in refusing the suit money was abused, but it does not even appear that the legal conditions existed on which the law predicates the right to this species of alimony. As we have pointed out, it does not appear that the spouses were living separately during the pendency of the suit. Nor does this bill of exceptions make any disclosure concerning the merits of the case, as they were disclosed to the trial judge upon the hearing of the evidence in chief. For aught that appears, he may have been satisfied, and upon sufficient evidence, that the cause was not prosecuted in good faith, but that it was prosecuted merely for the purpose of obtaining money from the husband. The character of the counsel engaged does not permit us to indulge in the presumption that they would thus lend themselves knowingly to such a prosecution; but we must deal with a case of this kind in conformity with legal rules. Nor does the bill of exceptions at all negative the conclusion, that the evidence may have disclosed such gross misconduct on the

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part of the wife as would justify a court in refusing her an allowance of money to prosecute a suit for divorce against her husband. It is just to the wife to say that we do not presume such misconduct, and that there is no evidence before us to show any misconduct whatever on her part, or to cast any imputation whatever upon her. We merely wish to make it clear that we cannot hold that the circuit judge has decided the application illegally, or abused his discretion in deciding it, in the entire absence of those disclosures concerning the merits of the controversy which the judge had before him when he determined the motion.

We must, therefore, affirm the order appealed from. It is so ordered. All the judges concur.

THE STATE OF MISSOURI, Respondent, v. LUKE F. QUINN, Appellant.

St. Louis Court of Appeals, May 3, 1892.

Criminal Law: UNLAWFUL SALE OF INTOXICATING LIQUOR BY DRUGGIST: INDICTMENT. An indictment charging an unlawful sale of intoxicating liquor by a druggist or pharmacist, but which fails to state the name of the person to whom the liquor was sold, is insufficient, and will not support a conviction.

Appeal from the Butler Circuit Court.—HON. JOHN G. WEAR, Judge

REVERSED AND REMANDED (*with directions*).

L. D. Grove, for appellant.

Robert F. Scott, for respondent.

THOMPSON, J.—The defendant was indicted in the circuit court of Butler county for selling intoxicating

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liquor contrary to the statute governing the sale of such liquor by licensed druggists and pharmacists. The indictment did not set out the name of the person to whom the liquor was sold. The defendant filed a motion for a bill of particulars, in which the name of such person should be set out, together with the date of the alleged offense; but this was denied him, and he saved his exceptions. At the trial the state produced a witness who testified that, on a date named, he bought one-half pint of whiskey of the defendant. It was admitted that the defendant was a regular licensed druggist and pharmacist, and the collector of the county testified that he had issued a merchant's license to him. The jury returned a verdict of guilty; the defendant was sentenced to pay a fine of $100, and he prosecutes the present appeal to reverse this sentence.

Upon the foregoing facts it appears that the indictment was not a valid indictment, that it will not support a conviction, and that it is not cured by the statute of jeofails. *State v. Cassity, ante*, p. 300; *State v. Martin*, 44 Mo. App. 45; s. c., affirmed by the supreme court in a manuscript opinion not yet reported.

The judgment of the circuit court will be reversed, and the cause remanded, with directions to sustain the defendant's motion in arrest of judgment, after which, the prosecuting attorney can, if he desires, move to have the defendant held to bail to answer a new indictment for information under the provisions of section 4275, of the Revised Statutes. It is so ordered. All the judges concur.

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Louisa Beckmann, Defendant in Error, v. The Phœnix Insurance Company of Brooklyn, New York, Plaintiff in Error.

St. Louis Court of Appeals, May 3, 1892.

1. **Motion for New Trial:** TIME FOR FILING. A motion for new trial must be filed within four secular or working days after the trial; otherwise exceptions taken at the trial will not be preserved by it. Nor will the fact that the trial court was not in session during these four days serve to extend the time for the filing of the motion. (*Clerk's Savings Bank v. Thomas*, 2 Mo. App. 367, is overruled).

2. **Practice, Appellate:** PRESUMPTIONS. A demurrer to a defective petition was sustained, whereupon the petition was by leave of court amended by interlineation, and the defendant answered. On appeal the transcript failed to show what interlineations were thus made. *Held*, that it must be presumed that they were sufficient to cure the defects in the petition.

3. **Pleading:** CONDITIONS PRECEDENT. A petition must allege the performance of a condition precedent to the right of recovery, or else sufficient excuse for the non-performance of the condition; otherwise it will be bad on demurrer.

4. ———: CURING THE ABSENCE OF ESSENTIAL AVERMENTS. But where the petition fails to make either such allegation, and the answer affirmatively pleads non-performance, and the plaintiff takes issue by reply, the defect in the petition will be helped out by the subsequent pleadings.

Error to the Franklin Circuit Court.—Hon. Rudolph Hirzel, Judge.

Affirmed.

E. T. & C. B. Allen and *John W. Booth*, for plaintiff in error.

J. C. Kiskaddon and *C. F. Gallenkamp*, for defendant in error.

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Rombauer, P. J.—On the twenty-fifth of January, 1890, the plaintiff recovered judgment against the defendant in a suit upon a policy of fire insurance. On the same day the court adjourned until February 4, which was a day within the same term of court; on the seventh of February the defendant filed its motion for new trial, which was by the court overruled on May 29, also during the said term of court. At a subsequent day of the term leave was given defendant to file its bill of exceptions on or before November 17, 1890. On November 17, which was during the November term of the court, by consent of all parties, the time was again extended, and the bill of exceptions was presented, signed by the judge and filed on December 30, 1890, which was within the time covered by the last extension.

The plaintiff contends that, upon the above showing, the defendant has failed to preserve any exceptions in the case for our review, because it appears by the uncontroverted recitals of the record proper, that no motion for new trial was filed within four days after the trial. The defendant contends that, as the court adjourned immediately after rendering judgment, and did not meet again until February 4, a motion for a new trial filed February 7 was filed within four days after trial, because the four days mentioned in the statute mean judicial days, viz., days on which the court is in session.

The view contended for by the plaintiff is the correct one. The statute requires motions for new trial to be filed within four days after the trial, if the term shall so long continue, and, if not, then before the end of the term. The days meant are secular or working days, and, if Sunday intervenes, that day is to be excluded from the computation. *National Bank v. Williams*, 46 Mo. 17; *Cattell v. Publishing Co.*, 88

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Mo. 356. But the fact that the court is not in session on any of these days is immaterial. The court has nothing to do with the filing of the motion as that is filed with the clerk by the complaining party as a matter of right. The statute prescribing the time is mandatory both in civil and criminal cases, and the supreme court has refused to relax the rule even in capital cases. In *State v. Brooks*, 92 Mo. 591, wherein it was attempted to have the court consider a motion for new trial presented fourteen days after the verdict, Judge NORTON, in delivering the opinion of the court, says: "This statute is mandatory, and, according to the uniform ruling of this court since the case of *Allen v. Brown*, 5 Mo. 323, a refusal to grant a new trial on a motion made more than four days after the trial is not error, and it has been further held that, unless it affirmatively appears by the record that the motion for new trial was filed within four days after trial, this court will not consider the question it presents. *Welsh v. St. Louis*, 73 Mo. 71: *Moran v. January*, 52 Mo. 523, and cases cited. In the case of *State v. Marshall*, 36 Mo. 400, where defendant was convicted of murder in the first degree, it is said: "No exception will be noticed here where no motion for a new trial has been made, *or what is the same thing*, where none is made and filed within the time prescribed by law."

We must conclude, therefore, that the defendant having failed to file any motion for new trial, as stated above, or, what is the same thing, having failed to file such motion within the time prescribed by law, it has lost the benefit of all exceptions taken at the trial, and we cannot consider its bill of exceptions as forming part of the record. The case of *Clerks' Savings Bank v. Thomas*, 2 Mo. App. 367, as far as it states the rule in that respect differently, is overruled.

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The only error assigned upon the record proper is that the petition does not state facts sufficient to constitute a cause of action. This assignment is supported by a statement in the printed argument, that the petition alleges several conditions precedent, but does not anywhere allege, either generally or specially, that plaintiff complied with them, and consequently does not state a cause of action. That the petition in that regard is defective may be conceded. A demurrer was interposed by the defendant; the court sustained it, and gave leave to the plaintiff to amend the petition by interlineations. What such interlineations were does not appear, but, as the defendant did not renew its demurrer but answered, we must assume that they were sufficient to remove the defect then complained of. No motion in arrest was ever filed.

Performance of a condition precedent must be alleged, or excuse given for the non-performance of it, or else the petition will be bad on demurrer. *Basye v. Ambrose*, 32 Mo. 484. Every fact which the plaintiff must prove to maintain his suit he must plead. *Pier v. Heinrichoffen*, 52 Mo. 333. Here, however, defendant's answer, by way of defense, sets up the non-performance of conditions precedent on the part of the plaintiff, and the plaintiff took issue by reply. As no finding for plaintiff could have been had, unless the evidence established either a performance of conditions precedent on her part, or their waiver on the part of the defendant, the case is one where the defects in plaintiff's petition were helped out by the other pleadings, and we would not be justified in vacating the judgment on the ground that the petition is defective in essential averments, even if we were justified in assuming that these defects were not remedied by the interlineations above referred to.

All the judges concurring, the judgment is affirmed.

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JOHN L. ROBARDS, Appellant, v. JOHN E. CLAYTON *et al.*, Respondents.

St. Louis Court of Appeals, May 3, 1892.

Pleading: BILL OF INTERPLEADER. It will not be sufficient for a bill of interpleader to state that the defendants make conflicting claims to the same fund in the hands of the plaintiff stakeholder, and that the plaintiff does not know to which of them to pay the fund. The bill will be bad on demurrer, unless it states the nature of these conflicting claims sufficiently to show a color of right to the fund on the part of each claimant.

Appeal from the Pike Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED.

John L. Robards, for appellant.

Harrison & Mahan, for respondent Clayton.

ROMBAUER, P. J.—The plaintiff filed a bill of interpleader against the defendants, who, as he alleges, are claimants to a certain fund in his possession. The bill asks for leave to pay the fund into court, and for an order directing the defendants to interplead. The defendant, John B. Clayton, who is alleged to be the representative of one of the classes, filed a general demurrer to the bill; the other defendants answered. The court sustained Clayton's demurrer, and the plaintiff declining to plead further, the court dismissed the bill as to all of the defendants and rendered judgment for costs in their favor against the plaintiff. From that judgment the plaintiff appeals.

The plaintiff's bill states that one John B. Helm, and his wife, Mary, placed into his hands as trustee,

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in the year 1871, the sum of $500 to be held, managed and disposed of, according to the terms of the following trust declared in writing: "To be used for the purpose and under the conditions now to be mentioned, viz.: The said sum to be put and kept at interest until the second son of J. L. and Sarah C. Robards, who has this day received, in the act of holy baptism, the christian name of John Helm (he being eight years old), arrives at the age of sixteen years, when the interest, in whole or in part, at the option of the trustee, may be expended in securing for him, the said John Helm Robards, a good literary and classical education; and if, when he is twenty years old, or before he is twenty-two, he shall elect to become an itinerant preacher in the Methodist Episcopal Church, South, then any remaining interest, together with the principal ($500), shall be devoted to his theological preparation for that sphere, and here the trusteeship of J. L. Robards shall end; but if the same John Helm Robards should die before attaining the age of twenty years, or if he, on reaching that age, should esteem it his duty to follow some other vocation in life, then the trustee, John L. Robards, shall devote the principal and remaining interest to the theological education of any other of my descendants who may be preparing for the ministry in the same church.

"On failing to find such party he shall settle the principal, with whatever of interest there may be, upon the Missouri Annual Conference of the Methodist Episcopal Church, South, which amount shall constitute a principal to remain intact, the interest of which shall go annually to the support of superannuated preachers, widows and orphans of that conference."

The bill then goes on to state that John B. Helm died June 1, 1872, and John Helm Robards, June 28,

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1872; that the plaintiff has kept and invested the fund since it was placed into his hands; that he disclaims any interest therein, and is now ready and willing to account for it to whoever may be entitled to it, and was always willing to do so, but that there are various claimants to said fund, and the plaintiff does not know which of them is so lawfully entitled to it, and, hence, prays for permission to pay the fund into court, and to be discharged upon his so doing from his trusteeship, and any further liability on account thereof.

The bill also states that the claimants to the fund are as follows: *First.* The descendants of John B. Helm and Mary Helm, his wife. *Second.* John B. Clayton, a descendant of John B. Helm. *Third.* The trustees of the conference fund of the Methodist Episcopal Church, South, which is now a corporation. That each of these classes claims to be lawfully entitled to the fund, and has demanded the same of him, and that John B. Clayton has actually instituted suit against him for its recovery. The title of said John B. Clayton is stated as follows: "That the defendant, John B. Clayton, is a descendant of said John B. Helm, and did, on the sixteenth day of April, 1889, also claim to plaintiff that he was entitled to said trust fund under the provisions and conditions of said written trust and did demand of plaintiff payment of the same to him."

We have no statutory provisions governing the proceedings in equity upon a bill of interpleader, and, hence, are remitted to the rules of chancery courts to determine whether this bill is subject to general demurrer as not stating a cause of action. A bill of interpleader "is ordinarily exhibited, where two or more persons claim the same debt, or duty, or other thing, from the plaintiff, by different or separate interests; and he, not knowing to which of the claimants he ought of right to render the same debt, duty or other thing,

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fears that he may suffer injury from their conflicting claims, and, therefore, he prays that they may be compelled to interplead, and state their several claims, so that the court may adjudge to whom the same debt, duty or other thing belongs." Story on Equity Pleading, sec. 291. If the bill should affirmatively show that neither of the defendants is entitled to the money, it will be bad on demurrer (*Barker v. Swain*, 4 Jones' Eq. (N. C.) 220), and if it shows affirmatively that one of the defendants is entitled to the money to the exclusion of others, it will be bad on demurrer. *Shaw v. Coster*, 8 Paige, 339. In either of these cases any of the defendants may demur.

While the respective claims need not be stated with such exactness as the defendants themselves may be required to state them after they are required to interplead (*Lozier's Ex'rs v. Van Saun's Adm'rs*, 3 N. J. Eq. 325), certainly they must be stated sufficiently to give a color of right to each of the defendants. We assume that no case can be found where a simple statement that the plaintiff holds a certain fund as trustee, and that two or more persons claim it as the beneficiaries of the trust, without more, was held a sufficient statement to maintain a bill of interpleader against the alleged claimants.

Now, if we apply the law thus stated to the plaintiff's bill, it necessarily results that the bill is bad on demurrer. It does sufficiently appear from it, by inference at least, what claim the trustees of the conference fund of the Methodist Episcopal Church might assert to it, because, in default of other beneficiaries, they are the residuary beneficiaries; but it does not appear what the descendants of John B. Helm and Mary Helm have to do with the fund, nor what John B. Clayton, who is alleged to be a descendant of John B. Helm alone, has to do with it. The bill, as far as it states anything

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touching them, affirmatively shows that neither of them has any title to the fund, and is not a proper defendant to a bill of interpleader.

As the judgment upon the demurrer is in its effect only a judgment of nonsuit, and as the bill shows that John B. Clayton has already instituted proceedings against the plaintiff, which proceedings are still pending, there is no reason why the plaintiff may not bring the fund into court in that proceeding and ask the parties to interplead therein, provided he can show good cause for an interpleader. As, however, there was no error in sustaining the demurrer to plaintiff's bill in this proceeding, the judgment of the court sustaining it, and dismissing the bill upon plaintiff's refusal to amend it, must be affirmed.

All the judges concurring, the judgment is affirmed.

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THE CITY OF SPRINGFIELD to use of C. D. MCEVILLY, Respondent, v. LYDIA A. KNOTT, Appellant.

St. Louis Court of Appeals, May 3, 1892.

1. **Municipal Corporation:** SPECIAL TAX BILLS: PROVIDING FOR WORK BY ORDINANCE. Where a city is authorized to act by ordinance, as where the statute provides that a city of the third class may provide by ordinance for the curbing and guttering of streets, the authority may be exercised by an act, termed a resolution, but adopted and approved by the mayor, with all the formalities required in the enactment of an ordinance.

2. **Special Tax Bill:** IRREGULARITIES IN PROCEEDINGS. A special tax bill for public work will not be invalidated for the want of literal compliance with a regulation which does not affect the substantial rights or interests of the property-holders. Accordingly, where it was provided that an estimate of the cost of certain work should be made

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at the direction of a city council, and be submitted to the council before a contract for the work was let, and where it appeared that the estimate was in fact made and was filed with the clerk of the council, it was *held*, that, in the absence of evidence showing that the contract price was unreasonable, a special tax bill for the work should not be declared invalid, because the journal of the council failed to show either the submission of the estimate to the council or any direction by the council for the making of this estimate.

Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

AFFIRMED.

Goode & Cravens and *Jas. R. Vaughan*, for appellant.

Barbour & Stellwagen, for respondent

ROMBAUER, P. J.—The plaintiff, who is the assignee of a special tax bill, issued to his assignor by the city of Springfield for work done in curbing and guttering a public street of said city in front of defendant's property, recovered a special lien judgment in this proceeding against said property. The defendant, appealing, assigns for error that the court admitted incompetent evidence; that the evidence introduced fails to show a right of recovery in the plaintiff, and hence, the judgment is not warranted by the evidence; and that the court erred in its declarations of law.

It was admitted upon the trial that the city of Springfield is a city of the third class, and the first inquiry which arises is, whether the plaintiff has given any substantial evidence tending to show that all preliminary steps have been taken by the city, which its charter makes essential before the defendant's property can be subjected to a charge for street improvements of this character.

Cities of this class are authorized by law to enact

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ordinances for curbing and guttering all streets, avenues and alleys, after the said streets, avenues and alleys have first been brought to grade, and for such work the assessment shall be made for each block separately on all lots and pieces of ground on either side of such street or avenue. R. S. 1889, sec. 1495.

These assessments shall be known as special assessments for improvements, and shall be levied and collected as a special tax, and a special tax bill shall issue therefor, and shall be paid in the manner provided by the ordinance. R. S. 1889, sec. 1496.

Before the council shall make any contract for curbing and guttering any street, an estimate of the cost thereof shall be made by the proper officer and submitted to the council, and no contract shall be entered into for any such work or improvement for a price exceeding such estimates. R. S. 1889, sec. 1497.

When the council shall deem it necessary to curb and gutter any street for which a special tax is to be levied, the council shall by resolution declare such work or improvements necessary to be done, and cause such resolution to be published in the newspaper doing the city printing for two consecutive weeks; and if a majority of the resident owners of the property, liable for taxation therefor, shall not, within ten days thereafter, file with the clerk of said city their protest against such improvements, then the council shall have power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided. R. S. 1889, sec. 1498.

The plaintiff introduced in evidence a general ordinance of the city of Springfield, defining in detail *what shall constitute first-class curbing and guttering in all cases;* also a general ordinance of said city, providing that whenever the council may deem it necessary to curb and gutter any street they shall instruct the city

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engineer to make an estimate of the cost of the improvements proposed to be made, and the engineer shall at once proceed to make such estimate and submit the same with specifications of the work proposed to be done to the council as soon thereafter as may be practicable. The same ordinance then goes on to say: "Before proceeding further with said improvement, the council shall by resolution declare such improvements necessary to be done, and cause such resolution to be published in the newspaper doing the city printing for two consecutive weeks." The ordinance then provides for the doing of the work under contract let on bids, unless a majority of the abutting property-owners protest as provided by section 1498, *supra.* The same ordinance has a further provision to the following effect: "All work under the contracts entered into under the provisions hereof shall be carried on under the supervision of the city engineer and street committee, who shall personally inspect the work as it progresses, and see that the same is done in accordance with the specifications and contract governing the same. On the completion thereof, if in the opinion of the city engineer and street committee such work has been done according to such specifications and contract, they shall report to the council. The council shall thereupon levy a special tax," etc.

The plaintiff also gave evidence of the adoption of the following resolution, passed by the council and approved by the mayor: "Resolved that the mayor and council of the city of Springfield deem it necessary to curb and gutter St. Louis street from the public square to Jefferson street, on both sides thereof, and, also, to curb and gutter Jefferson street from Walnut street to St. Louis street, on both sides of said street, *with curbing and guttering of the first class.*"

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The plaintiff also gave evidence tending to show that the city engineer did make a preliminary written estimate of the cost of the work, estimating it at $1.75 per running foot, and filed it with the city clerk. The city engineer testified that he did not know whether the council ordered him to make this estimate, but that was the custom, and he remembered making it. No written evidence of the order of the council, or of the report of the engineer, was produced at the trial. The engineer advertised for bids by handbills, but it was not shown that that mode of advertising was directed by the council. The plaintiff's assignor made a bid of $1.65 per running foot, which was the lowest bid. The council accepted the bid by a unanimous vote, and a contract at that price was let to the plaintiff's assignor by the street committee, he executing a bond for the faithful performance of the work, which was approved by the mayor. The plaintiff also gave in evidence the written report of the street committee to the mayor and council that the work in question had been completed, and an order of the council to issue a special tax bill therefor to the contractor. No evidence whatever was offered by the defendant which had any tendency to show that the work was not done by the contractor in strict conformity with his contract, nor that the price, at which the contract was awarded, was not the reasonable value of the work.

The appellant's main contention is that, as the plaintiff failed to show that the work sued for was authorized by a special ordinance requiring the work to be done, the plaintiff's claim must fail for the want of a valid foundation upon which to rest. This argument rests on the proposition that cities of the third class under section 1495, *supra*, are empowered by ordinance *only* to provide for the curbing and guttering of their streets, and, therefore, must exercise that power in

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each special instance, by ordinance, the adoption of which requires a concurrent action on part of the council and mayor, and that they cannot do so by resolution of the council, which *may* become effective without approval of the mayor. It has been repeatedly held in this state that, where power is vested by the charter in the mayor and councilmen to do a certain act, the act cannot be legally done by the council alone (*Saxton v. Beach*, 50 Mo. 488; *Saxton v. St. Joseph*, 60 Mo. 153); but we are not aware of any case that pointedly decides that where such power has to be exercised by ordinance, it cannot be exercised by resolution, provided the resolution is adopted by the council and approved by the mayor, with all the formalities required in the passage of ordinances. There is an intimation in the opinion of the court in *Saxton v. Beach, supra*, and also in *Cape Girardeau v. Fougeau*, 30 Mo. App. 551, that this might be done. In this case it appears by the record that the resolution was adopted by a unanimous vote of the council upon a call of the ayes and nays, and that it was approved by the mayor, and published in the official paper of the city of Springfield, in the same manner as ordinances are required to be published, and the resolution upon its face purports to be the joint act of the mayor and council. To hold, therefore, that the joint act of the council and mayor is invalid, solely because the instrument evidencing it is called a resolution and not an ordinance, would be adhering to a mere form without giving effect to substantial requirements.

Nor can we, in the absence of evidence having any tendency to show that the contract price of this work was not reasonable, reverse the judgment on the ground that it does not appear by the journals of the council that it ordered the city engineer to make an estimate prior to ordering the work, and that it does not appear by the journal of said body that the engineer submitted

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the estimate made by him to the council. It does appear by the evidence of the person, who occupied the position of city engineer when this work was ordered, that he did make a written estimate of the cost of this work, and he thought he filed it with the city clerk, as it was his custom to do so. Whether it was ever submitted to the council, he did not know. That estimate was $1.75 per running foot, or ten cents per running foot in excess of the contract price at which plaintiff's assignor did the work.

In *Sheehan v. Owen*, 82 Mo. 458, 465, where the defendant sought to defeat the claim of the contractor, because no plans and profiles of the work had been made as required by ordinance, and because the evidence was merely inferential that the mayor and council had acted concurrently in awarding the contract, and because it did not affirmatively appear that the plaintiff was the lowest and best bidder, the court in disposing of these objections said: "The work has been done by plaintiff. No complaint is made that it was not done according to the contract, or that plaintiff is in any manner charged with notice of alleged irregularities in the proceedings of the council or the acts of the city officials, and, while there may have been some irregularities, the ordinances were substantially complied with by the city authorities, and nothing done or omitted which could possibly have affected injuriously the interests of the defendant or other property-holders, and we are not inclined to turn a plaintiff out of court who has given his time and expended his money in the improvement of their property, on mere technicalities, which in no manner affect the substantial rights or interests of the parties." This case is approvingly cited in the recent decision of *Cole v. Skrainka*, 105 Mo. 309, where Judge BLACK adds: "This court has never adopted the extreme view

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that, in order to recover for these local improvements, the plaintiff must show a literal compliance with all the provisions of the ordinances. Distinction must be made between those matters which affect the substantial rights of the parties, and those which are formal or directory."

The court, at the request of the defendant, declared the law as follows: "That, before the city council could make the improvements referred to in plaintiff's petition so as to bind the defendant to the payment of a tax bill issued for the cost of the same, it was essential that a declaratory resolution, as provided in section 34 of articles regulating cities of the third class, should be first duly passed and published as required in said section.

"That, before the council could lawfully issue or direct by an ordinance that a tax bill issue, it was essential that the street committee, or a majority of the same, and the city engineer should report to the council that the work done abutting defendant's property was so done according to the contract and specifications provided.

"That, this action being upon a tax bill for the price of the work done, the only evidence admissible (as a basis for a tax bill, or recovery of such price), that the work was done according to the contract and specifications, is the report of the city engineer and a majority of the street committee."

We have examined other declarations of law asked by the defendant, and conclude that, under the uncontroverted facts of this case, there is no error in their refusal by the court. Some had reference to the necessity of a special ordinance for this work. Their impropriety is disposed of by what is above said. Others declared as a matter of law, that there was no evidence before the court that the council had ordered

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the engineer to make an estimate, or that he made it and submitted it to the council as required by the ordinances. These were based on the proposition, that record evidence of such fact was essential to establish it, and were rightly refused. Others again declared that bringing the street to grade was an essential prerequisite to constructing a curb. There was, as we understand the record, no evidence that the street had not been graded prior to the resolution providing for the curbing. There was some evidence offered by the defendant, which was contradicted by the plaintiff, that, owing to a difference between the grade as established by ordinance and the grade as physically established on the surface of the street, the curb set was in some places above and in some places below the grade established by ordinance. There was no evidence that this variation, if it existed, had an injurious effect on the value of the curb. As the case was tried by the court without the intervention of a jury, and as the instructions offered on that subject taken in one sense were opposed to all the evidence, and taken in another sense were misleading, we are not justified in reversing the judgment on account of their refusal, as for error materially affecting the merits of the action.

All the judges concurring the judgment is affirmed. So ordered.

S. W. WALTON, Respondent, v. THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD COMPANY, Appellant.

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St. Louis Court of Appeals, May 3, 1892.

1. **Practice, Appellate**: REVIEW OF FINDING OF FACT. Where the preponderance of the evidence against the verdict in an action at law is so strong as to raise a presumption of prejudice, corruption or gross ignorance, on the part of the jury, a new trial will be granted on appeal.

2. **Practice, Trial:** REMARKS OF COUNSEL TO JURY. *Held,* that improper remarks of the counsel of the successful party to the jury were not ground for a new trial, inasmuch as they were checked by the reprimand of the court and not repeated.

Appeal from the Webster Circuit Court.—HON. W. I. WALLACE, Judge.

REVERSED AND REMANDED.

Wallace Pratt and *J. C. Cravens*, for appellant.

(1) The verdict is so opposed to the evidence, that it must be attributed to bias, prejudice or passion, and, accordingly, ought not to be upheld. *Price v. Evans*, 49 Mo. 396; *Rose v. St. Charles*, 49 Mo. 509; *O'Donnell v. Railroad*, 7 Mo. App. 190; *Borgraefe v. Knights*, 22 Mo. App. 127; *Bruen v. Fair Ass'n*, 40 Mo. App. 425. (2) The remarks of counsel for plaintiff were grossly improper and highly prejudicial to defendant, and the court's slight reprimand does not seem to have been of any effect, for the remarks were repeated. *Haliday v. Jackson*, 21 Mo. App. 660; *Sidekum v. Railroad*, 93 Mo. 400; *Koch v. Heble*, 32 Mo. App. 103.

Fyan & Dickey, for respondent.

ROMBAUER, P. J.—This cause was here on a former appeal by the defendant. 40 Mo. App. 544. We then reversed the judgment for the reason that the *opinion* of a witness as to the cause of the injury was improperly admitted, and intimated that, in view of the fact that the verdict was opposed to the weight of the evidence, the error was clearly prejudicial. We also held that, under the evidence then adduced, the court committed no error in submitting the cause to the jury. We added that, in other respects, the cause was fairly tried. The cause has been retried, resulting in a

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verdict for the plaintiff in an increased amount, and the defendant, appealing, assigns for error that the verdict in the case is so strongly opposed to the weight of the evidence, as to be a mere mockery of justice, and clearly the result of bias and prejudice; that the court erred in its instructions to the jury; and that counsel for the plaintiff was permitted to make grossly improper remarks to the jury in his closing argument.

The facts of the case have substantially been stated in the former opinion. The action is one to recover damages sustained by the plaintiff by reason of the alleged negligence of the defendant in the transportation of a carload of live stock from Fordland, Missouri, to Kansas City, by which nine steers and twelve hogs were killed in transit. The testimony concedes that the stock was transported under a special contract for one carload of *cattle*, entered into between the plaintiff and defendant upon a sufficient consideration, which contract, among other things, contained the following clause bearing on the question under investigation: "The said party of the second part (plaintiff) hereby assumes all risk of injury which the animals, or either of them, may receive in consequence of any of them being wild, unruly or weak, or by maiming each other, or themselves, or in consequence of heat, or suffocation, or other ill effects of being crowded in the cars." The plaintiff contended, and sought to establish, by evidence adduced at the trial, that the animals were killed owing to the fact that the train on which they were transported was too heavy for the engine; that in consequence thereof the train stalled a number of times on a steep grade between Humansville and Deepwater, being two stations about thirty-seven miles apart; and that the repeated violent jerking of the train had a tendency to knock the cattle off their feet and make them fall upon each other. The plaintiff's evidence on

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that subject at the last trial was substantially the same as at the preceding trial. It is set out in full in our former opinion in 40 Mo. App. 544. The defendant, on the other hand, sought to establish by evidence that the injury sustained by the stock was due mainly, if not exclusively, to the fact that they were greatly overcrowded in the car.

It is conceded that the car was loaded by plaintiff himself at a switch of the defendant's at Diggins, Webster county; that no agent of the defendant was present while the car was being loaded; and that the contract of transportation was signed at Fordland, the nearest station to said switch. The plaintiff himself testifies that the average weight of the twenty-eight cattle was between eight hundred and nine hundred pounds, and the average weight of the thirty-one hogs between one hundred and eighty and one hundred and ninety pounds, making, according to plaintiff's testimony, a minimum aggregate weight of twenty-eight thousand, six hundred pounds, and an aggregate maximum weight of thirty-one thousand and ninety pounds, or, according to the most favorable view admissible in plaintiff's behalf an aggregate weight of twenty-nine thousand, eight hundred and forty-five pounds. The plaintiff further testifies that these cattle and hogs were partly corn-fed. The car in which they were loaded was a thirty-foot car, having a length of thirty feet by a width of eight feet, three inches in the clear. The plaintiff gave no evidence whatever of what constitutes a proper load for a car of that size, although he did testify that the car was not crowded, and that the stock had plenty of room. Two witnesses on his behalf, neither of whom had shipped any stock before, also testified to the fact that the stock seemed to have sufficient room. It also appeared by the plaintiff's evidence that his car was in charge of one Trimble, who had a

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carload of stock in the same train immediately in front of plaintiff's car and next to the engine; that Trimble's car was of the same size, and carried twenty-eight head of cattle and eight hogs, of an aggregate weight of twenty-one thousand, three hundred and seventy-five pounds; and that Trimble's stock rode through the entire distance from Diggins to Kansas City, a distance of two hundred and thirty-two miles, without any accident or injury whatever.

The defendant gave the following evidence, which was uncontradicted in any manner: That, under the inter-state tariff rules, a carload consists of twenty thousand pounds, and that carload rates were made on the basis of twenty thousand pounds per car. The defendant then called three extensive shippers of cattle, two of whom testified that they had shipped annually many hundred carloads of stock. They all testified that an ordinary carload was twenty thousand pounds, and that twenty-two thousand pounds is the extent to which any car should be loaded, and can be loaded with safety for any great distance. The shippers shipped from Seymour, a station on the same road, close to Fordland. The following question was then put to each of them: "Could it be reasonably expected that twenty-eight head of cattle averaging eight hundred pounds or over each, and thirty-one hogs averaging one hundred and seventy-five pounds each, and fit for the beef and pork market of Kansas City, crowded into a thirty-foot car, considering the jarring and jostling incident to an ordinarily well-managed freight train, would go through from about Seymour to Kansas City without more or less suffocation, and injury to them from heat and suffocation?" They all answered the question uniformly that they could not go through without injury, one testifying that it would be impossible for them to go through with safety. They explained their testimony

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in detail, showing the causes that would bring about the injury; that cattle crowded in such a manner get overheated; that the mixed manure of cattle and hogs slimes the bottom of the car, which gets slippery; that the cattle fall down, and owing to the crowded condition of the car are unable to get up again; and that every animal which falls down and keeps down, necessarily gets into the way of others and causes others to fall down. It is not claimed that these witnesses were not wholly disinterested, or that they were not fully competent to testify to the facts sworn to by them, and there is not one circumstance which tends to impeach the testimony of either of them; on the contrary this testimony seems to be perfectly consonant with the natural and physical results of given conditions, and borne out by the results of this very case. That this car was overcrowded cannot be denied upon the facts conceded by the plaintiff's own evidence, and is conclusively established by the unimpeached testimony of the defendant. The only thing that can be urged as furnishing some other cause of the injury to these cattle is that they rode safely from Diggins to Humansville, a distance of ninety miles, and were found to be in this injured condition at Deepwater, which is only thirty-seven miles beyond Humansville. Hence, it is argued that the stalling and jerking of the train between these two last stations must have brought about the injury. That argument, however, is refuted by the fact that none of the cattle in Trimble's car, which was the very next car to that of the plaintiff, were in the least injured between these two stations, but that they passed safely through to Kansas City.

It appears by the plaintiff's own testimony that Trimble's car was also loaded with cattle and hogs, and was loaded to its full capacity although not over-

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crowded. The argument is further refuted by the evidence of the plaintiff's witness Trimble, who admits that two of the plaintiff's steers had fallen down before the train reached Springfield, which is only thirty miles from Diggins. The only conflict in the evidence on that head is that Trimble testifies that only two steers were down at Springfield and he got both of them up, while the defendant's witnesses testify that three were down, and Trimble, after getting up two of them, said the third was lying well and he would let it lie. The argument is further refuted by the fact, conceded by all the evidence and consonant with ordinary experience, that in the beginning of a trip cattle are not as liable to fall down, as they are when tired out in a long journey. It is also refuted by the fact that the conductor, engineer and brakemen of the train all deny that there was any stalling of this train between Humansville and Deepwater, and, conceding that they are biased witnesses, their testimony in that respect seems to be fully borne out by the fact that not one of Trimble's cattle was thrown down in the passage between Humansville and Deepwater; also that the testimony is uncontradicted that the train was of ordinary size and weight for the engine that drew it, and, instead of losing time, it gained upon its schedule time between Humansville and Deepwater. We have set out the testimony thus fully, because upon careful consideration of it we have reached the conclusion that it is our duty to set the verdict aside as evidently being not the result of a weighing of the evidence by the jury, but either the result of bias or prejudice, or a mistake of the law given to them by the court.

The court, upon the defendant's request, gave the following instructions to the jury, among others: "Although you may believe from the evidence that the defendant was guilty of the acts of negligence

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charged in plaintiff's petition, yet if you also believe from the evidence that the plaintiff materially contributed to the injuries complained of by overloading and crowding too many animals in said car, you will find the issues for the defendant."

"The undisputed evidence in this case shows that the dead cattle and hogs in controversy perished from suffocation or heat by their getting down upon one another in the car. And the plaintiff by his contract having assumed such risk and exempted the defendant from all liability for injuries resulting from such cause, you will find the issues for the defendant, unless the plaintiff has proven to your satisfaction that such injuries were the direct consequence of some wrongful act of the defendant or its servants, and without any fault of the plaintiff or his agent contributing thereto."

How the jury, under the evidence above detailed, and under these instructions, could have reached the result they arrived at, is inconceivable. That appellate courts will not weigh the evidence is true, but that is saying no more than that the credibility of witnesses is in the first instance for the jury. In *Price v. Evans*, 49 Mo. 396, Judge Bliss impliedly states that it is error in the trial court to refuse a new trial, where the preponderance of evidence against the verdict is so strong as to raise a presumption of prejudice, corruption or gross ignorance on part of the jury. The rule thus stated was reaffirmed in *Spohn v. Railroad*, 87 Mo. 74, and was emphasized by us repeatedly. *Lionberger v. Pohlman*, 16 Mo. App. 392; *Borgraefe v. Knights of Honor*, 22 Mo. App. 148; *Friesz v. Fallon*, 24 Mo. App. 439. The present case calls clearly for the application of the rule.

We do not desire to discuss other points made in appellant's brief, as they arose likewise on the former appeal, and our judgment then, in conformity with the

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rules applicable to appellate procedure, furnishes the law of this case. The appellant's abstract concedes that the obnoxious remarks made by counsel for plaintiff in his final argument were reprimanded by the court at once; hence, even if the remarks were objectionable, the court committed no error, because it promply checked them, and they were not repeated.

For the reasons above stated, however, the judgment will be reversed and the cause remanded. All the judges concurring, it is so ordered.

JACOB HILES, Respondent, v. J. WILL RULE, W. G. TINSLEY AND JULIA HILES, Defendants; J. WILL RULE AND JULIA HILES, Appellants.

St. Louis Court of Appeals, May 10, 1892.

Jurisdiction, Appellate. An action for the partition of land, in which the plaintiff's title, and, therefore, his right to a partition, is denied by one of the defendants, involves title to land, and the supreme court has jurisdiction of an appeal by such defendant from a decree of partition therein.

Appeal from the Louisiana Court of Common Pleas. HON. E. M. HUGHES, Judge.

TRANSFERRED TO SUPREME COURT.

Fagg & Ball, for appellants.

W. H. Morrow, for respondent.

ROMBAUER, P. J.—The plaintiff, who claims to be the owner of one undivided fifth of certain lands in Pike county, filed his petition for partition, making the defendants Tinsley and Rule parties defendant. The petition states that Rule is the owner of the other undivided four-fifths of the land, and that Tinsley is the

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trustee in a deed of trust executed by plaintiff, and conveying to him, Tinsley, the plaintiff's undivided one-fifth as security for the payment of a note for $300, held by W. H. Morrow.

W. H. Morrow, who is an attorney at law, signed as such the petition of Hiles, the plaintiff, and the answer of Tinsley, the defendant, who as above seen was his trustee. That answer admitted the facts stated in the petition to be true. The defendant Rule filed an answer, claiming that the plaintiff had no title to any part of the land, because the undivided one-fifth interest, formerly owned by him, had been sold on execution under a judgment for maintenance in favor of Julia Hiles, the plaintiff's wife, and was owned by D. A. Ball. This answer was signed by Ball as one of Rule's attorneys. Julia Hiles, the wife of the plaintiff, was, upon her request, permitted to file an answer in the case, in which she set up the fact that she recovered a judgment for the sum of $600 for maintenance against the plaintiff, and that no part of such judgment was satisfied, except $100, which was realized from an attempted sale at execution of the plaintiff's interest in the land to Ball. This answer was also signed by Ball as one of the attorneys. The plaintiff replied to the answers of Mrs. Hiles and Rule, stating in his reply that if Ball did claim any interest in the land, he should voluntarily enter his appearance as a defendant. In point of fact Ball did not enter his appearance, but the case went to trial on the pleadings above stated, and upon such trial the court rendered judgment, declaring that the plaintiff was the owner of one undivided fifth, subject to the incumbrance created by the deed of trust to Tinsley, and the defendant Rule was the owner of the other four-fifths. The court also found that partition in kind could not be made, and ordered a sale of the land and distribution of proceeds as above. From

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this judgment the defendant Rule and Julia Hiles appeal.

It is not assigned for error by the appellants that there is a defect of parties in this case, nor that D. A. Ball is a necessary party to a complete determination of the action. The answer of the defendant Rule denies that the plaintiff had any title or interest in the land, and claims that such interest has passed to Ball; but does not ask that Ball be made a party defendant. On what theory Mrs. Hiles was permitted to intervene as a defendant does not clearly appear. If Ball's ownership of the land were conceded, the judgment would have to be reversed, as every party who has an interest in the premises must be made a party to a petition in partition. R. S. 1889, sec. 7135; *Dameron v. Jameson*, 71 Mo. 97. If, on the other hand, the plaintiff's equity of redemption, or whatever other title he had, was closed out in the sale to Ball, the petition would have to be dismissed; because one who has no interest in land cannot maintain an action for its partition. The evidence upon the trial was confined mainly to the question, whether the plaintiff's title to the land was divested by the execution sale. The plaintiff contended that it was not; because the court could not render a judgment of maintenance without personal service, and because the land affected was not within the jurisdiction of the court, and the defendant Rule contended for the opposite view. These are the propositions argued before us on appeal. On the plaintiff's theory, Ball was neither a proper nor necessary party to the suit; neither was he such on the defendant Rule's theory; because, if that defendant's contention was correct, there could be no partition at all, as, upon the showing that the sole plaintiff had no interest in the land, the petition would have to be dismissed.

The plaintiff filed a motion to transfer this cause

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to the supreme court, which we overruled on the ground that the title to the real estate was not involved, because Ball, the adverse claimant, was not before the court. On reconsidering the matter, we must recede from that position. It is true that the title of Ball could not be adjudged in this proceeding, because he was not before the court, but the plaintiff's title could; and, as between him and the defendant Rule, the title was necessarily involved. If the plaintiff had no title, he could not compel the defendant Rule to submit to partition, and the court, in decreeing partition, necessarily decided that the plaintiff had title, although that fact was denied.

It results from the foregoing that our judgment upon the motion to transfer must be set aside, and the cause transferred to the supreme court as an action involving title to real estate. So ordered. All the judges concur.

HERMAN A. HAEUSSLER, Appellant, v. THE HOLMAN PAPER-BOX COMPANY, Respondent.

St. Louis Court of Appeals, May 10, 1892.

1. **Landlord and Tenant:** HOLDING OVER AFTER EXPIRATION OF LEASE. When a tenant holds over after the expiration of a written lease, the law, in the absence of a contrary provision by express contract, implies that he holds over subject to the terms of the lease, as far as the same are applicable to a monthly letting.

2. ——: ——: RIGHT OF GRANTEE OF REVERSION. If the landlord sells and conveys the reversion after the expiration of the lease, his grantee acquires a right of action for a subsequent breach of the terms of letting thus implied, but none for a breach occurring prior to the conveyance. The purchaser in such case acquires only a right to the premises in the condition in which they are at the time of conveyance.

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Appeal from the St. Louis City Circuit Court.—Hon. Daniel Dillon, Judge.

Reversed and remanded.

Broadhead & Hezel, for appellant.

(1) By holding over at the expiration of the tenancy, a new tenancy from month to month was established, and the law, in the silence of the parties, presumes that the tenant holds the premises subject to all such covenants contained in the original lease as apply to his present situation. R. S. 1889, sec. 6371; *Bishop v. Howard*, 2 B. & C. 100; *Jordan v. Ward*, 1 H. Bl. 99; *Diller v. Roberts*, 13 S. & R. 63; *Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Wolffe v. Wolffe*, 69 Ala. 549; *Achley v. Westevelt*, 86 N. Y. 448; *Tolle v. Orth*, 75 Ind. 298; *Grant v. White*, 42 Mo. 285; *Bircher v. Parker*, 40 Mo. 118; *Rigge v. Bell*, 5 T. R. 571; *Bealè v. Sanders*, 3 Bing. (N. C.) 850. (2) The allegation that after the conveyance to Haeussler defendant attorned to plaintiff, paying in rent under the same terms and at the same rate as before, is a sufficient allegation.

Collins & Jamison, for respondent.

(1) From the allegations appearing in the petition this suit is for an alleged breach of covenants in a lease which expired on January 1, 1890. The plaintiff acquired the title to the property on the seventeenth day of October, 1890, nearly ten months after the expiration of the lease. There is no allegation that the lease was renewed. After January 1, 1890, the respondent was simply a tenant from month to month and was not holding under the lease; consequently, respondent cannot be held under the lease for acts alleged to have been

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done and performed on May 1, 1891, more than one year after the expiration of the lease. R. S. 1889, sec. 6371; *Delaney v. Flannigan*, 41 Mo. App. 656; *Drey v. Doyle*, 28 Mo. App. 256; *Hammon v. Douglas*, 50 Mo. 442. (2) The appellants having brought this suit for breach of covenants in the lease cannot now attempt to hold respondent on the theory that it used the premises in violation of its duties as a tenant from month to month. (3) There is no obligation on the part of the tenant from month to month to make any expenditures on the property rented and restore them to the condition claimed by plaintiff. Taylor's Landlord & Tenant, sec. 343; *Thorndyke v. Burroge*, 111 Mass. 531.

Rombauer, P. J.—The circuit court sustained a demurrer to the following petition, and the only question on this appeal is whether it states a cause of action. "Plaintiff, Herman A. Haeussler, states that, on the first day of January, 1885, one Alexander G. Black was the owner of the following described real estate, lying and being in the city of St. Louis, Missouri, to-wit: Lot number 35 of said city and a four-story brick building erected thereon, said premises being known as 3 South Main street; that defendant, Holman Paper-Box Company, at that time and since was and is a corporation under the laws of the state of Missouri. Plaintiff further states that on the twentieth day of October, 1885, said Alexander G. Black leased to the defendant by an instrument in writing executed in duplicate and dated October 20, 1885, the above described property at an annual rental of $2,000 per annum, payable monthly in advance, for a period of five years from January 1, 1885, and that defendants therein covenanted to surrender the premises at the expiration of the lease and all keys to the same to the said Black, or his assigns, in the condition received,

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excepting natural wear and decay or the effects of fire, and to replace all broken glass, and that the improvements made on the premises by the lessee were to remain and belong to the said lessor at the expiration of the lease, and defendant further covenanted to keep the premises and tenement free from nuisance, and to remove all rubbish and ashes in the cellars and yards at its expense, and that defendant received the premises and occupied the same under the lease. Plaintiff states that the copy of said lease belonging to Black is lost, and the other copy thereof is in possession of the defendant. Plaintiff states that, at the time of the receipt of the premises under the lease, the premises and tenement were in perfect condition and repair, free from nuisance and rubbish, and all keys were given defendant.

"That said lease expired on the first day of January, 1890, and the defendant held over and remained in the possession of said premises and tenement under the same terms and conditions, paying in rent under the lease rate and according to its terms until the first day of May, 1891.

"Plaintiff states that, on the seventeenth day of October, 1890, said Black executed and delivered to plaintiff his good and sufficient deed to the above described premises for a valuable consideration, said deed being recorded on November 1, 1890, in the recorder's office of the city of St. Louis, Missouri, and that defendant at that time attorned to plaintiff, and paid his rent at the same rate and times as under original lease to plaintiff's agent. Plaintiff says that, on May 1, 1891, the defendant vacated said premises, and that defendant neglected and failed to surrender the keys and neglected and failed to return the premises in the condition received save the natural wear and decay and effects of fire, and failed and neglected to replace the broken glass and remove all rubbish and

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ashes, but that defendant left said premises in a filthy, dirty condition; that the keys were not returned and that the floors in places are so soaked with oil as to become useless, and must be replaced; that defendant caused blocks of wood to be nailed or screwed to the ceiling, cut holes in the floors, broke the plastering, the iron hinges on the cellar doors, and left the cellar and second floor of said tenement full of pasteboard, paper, dirt, old boxes, barrels and boards; that defendant's employes broke the brick sills on the inside of said building, unnecessarily begrimed the whitened walls and painted woodwork; that numerous panes of glass were broken and unreplaced, and that by such failure to repair, replace the lights, keep the premises free from dirt and to surrender all keys, plaintiff is damaged in the sum of $1,000."

In the absence of a different rule, created by statute or by express contract, where a tenant holds over after the expiration of a written lease, the law implies that he holds over subject to the terms of the lease as far as the same are applicable to a monthly letting. Where the tenant holds over and there is no change in the ownership of the reversion, and breaches of the tenant's contract occur both before and after the expiration of the term of years, the landlord cannot sue for breach of covenant for the tenant's misconduct during his monthly occupancy, but can recover for those only as for a violation of the implied contract, while his action for breaches occurring during the term of years is an action on the express covenants of the lease. Since such would be the result, even where the landlord and tenant remain the same, it is *a fortiori* the result, where the landlord disposes of his interest after the expiration of the term, and during the tenant's monthly occupancy. The purchaser in such a case acquires the premises in the condition in which they then are, and not in a condition

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in which they were years before. If the tenant attorns to the purchaser, he attorns to him as a monthly tenant, and not as the tenant of the term which has expired.

It was held upon very careful consideration in *Grandy v. Jubber*, 5 Best & Smith, 78, that even a tenancy from year to year is not a continuing tenancy, but is, in contemplation of law, a new letting every year. There the tenant suffered a continuous nuisance on the premises. In one of the years while the nuisance was existing, the defendant acquired the reversion of the premises and the tenant attorned to him and continued to hold under him. In the succeeding year the plaintiff's wife was injured by the nuisance. The judges were unanimous in opinion that the defendant was responsible, because, although the tenant continued to hold over without any new contract, yet, in contemplation of law, the premises were relet to him at the beginning of every year, and a landlord who lets premises with a nuisance existing thereon is responsible to third persons injured by the nuisance.

It is well settled that even the assignee of the reversion, during the term, can sue only for such breaches of covenants as occurred after the assignment to him. 2 Taylor's Landlord & Tenant, sec. 445. In the case at bar, plaintiff, in his petition, set out the covenants of the lease, without averring that he was the assignee of the lease. As the petition nowhere states in express terms that defendant violated any of the terms of the implied contract existing between him and the plaintiff, the court evidently treated the petition as a suit upon covenants of a lease, of which the plaintiff was not the owner, and, hence, not maintainable. But the proper test of the petition is not whether the relief it prays for is warranted by its averments, but whether the facts stated warranted any relief, and we are of the

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opinion that the petition does state a cause of action for relief.

It must be borne in mind that, although the covenants of the lease did not pass to the plaintiff without assignment, yet the defendant's holding under the plaintiff was upon a contract implied by his continued occupancy to the effect that the terms of his holding should be the same as under the lease, as far as such terms were applicable to a monthly tenancy. While the petition does not, in express terms, aver that these conditions were violated after the defendant's attornment to the plaintiff, it is a necessary inference from its allegations, that some of them were thus violated, because they thus relate to the final surrender of the premises, and are equally applicable to a tenancy from month to month, as to a tenancy for a longer period.

While on the one hand the plaintiff is not entitled to recover for breaches of the covenant, nor for any injury to the premises done prior to the time when he became the owner of the reversion, he is entitled to recover for all injury to the premises beyond ordinary wear and tear done to them by defendant while he held under the plaintiff, and for all losses suffered by the plaintiff relating to the surrender of the premises as far as such conditions are contained in the lease, and are consonant with a letting from month to month.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion. Judge BIGGS concurs; Judge THOMPSON concurs in the result.

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R. H. Blackwell, Respondent, v. A. W. Fry, Appellant.

St. Louis Court of Appeals, May 10, 1892.

1. **Attachment, Grounds for:** FRAUDULENT CONTRACTION OF DEBT. If a debtor contracts a debt with the preconceived intention not to pay it, the debt is fraudulently contracted within the meaning of the statute defining the grounds for attachment, and the creditor is accordingly entitled to a writ of attachment in aid of his suit thereon.

2. ——: ——: CIRCUMSTANTIAL EVIDENCE. The existence of an intention on the part of the debtor never to pay the debt may be established by circumstantial evidence.

Appeal from the St. Louis City Circuit Court.—Hon. Jacob Klein, Judge.

Affirmed.

Nat. C. Dryden and *T. J. Rowe*, for appellant.

No brief filed for respondent.

Biggs, J.—This is an action on an account with an attachment in aid. It originated before a justice of the peace. On appeal to the circuit court there was a trial of the plea in abatement, in which the issues were found for the plaintiff and the attachment sustained, there being no controversy as to the debt. Judgment was entered on stipulation for the amount sued for. The defendant's motion for a new trial on the plea in abatement being overruled, he thereupon tendered his bill of exceptions, and prayed for an appeal to this court, which was granted.

Among the several alleged grounds for the attachment, the one which charged that the debt was fraudulently contracted was the only one which was submitted

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to the jury. As to that issue the court instructed as follows: "1. But if from all the evidence in the case you believe and find that, at the time when the debt sued for in this case was contracted by the defendant, he had the purpose and intention of defrauding the plaintiff as to such indebtedness, and had formed the purpose and intention at the time not to pay the same, then your verdict should be for the plaintiff.

"2. And in determining the question, whether or not the debt sued for was fraudulently contracted, you are to consider all the facts and circumstances shown in evidence. And if from all such facts and circumstances shown in evidence you are satisfied that, at the time the defendant contracted the debt in question, he knew that he would not be able to pay the said indebtedness, you are at liberty from that fact to infer that he had at the time formed an intention and purpose not to pay the same; but you are not bound to draw that inference from the mere fact, if it is a fact, that the defendant knew at the time that he would not be able to pay said indebtedness."

The defendant asked the court to instruct that under the law and evidence the finding should be for him; this instruction the court refused. The defendant asked and the court gave other instructions, but it is not necessary to set them out.

The argument of the defendant's counsel in support of the demurrer to the evidence, and against the correctness of the instructions of the court, is that the evidence was not sufficient to establish that the debt sued for was fraudulently contracted within the meaning of the attachment law. This contention rests on the theory, that it cannot be said that a debt is fraudulently contracted so as to authorize an attachment, unless some false act or manifestation of the debtor was relied on by the creditor, and he was thereby induced to

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extend the credit. This theory can only be applied to the facts in the present case, if an intention not to pay an obligation at the time it is incurred does not amount to the fraudulent contracting of a debt within the meaning of the attachment law. It would be preposterous in such a case to require the creditor to go further, and show that he was in some way deceived or misled by some manifestations of the debtor by which he was induced to give him credit; for, if a debtor entertained such a design, he would be careful to conceal it. This is what the defendant's argument leads to. Therefore, we are of the opinion that if the defendant's assignments are to be sustained at all, it must be upon the ground that the court's instructions are wrong in that they submitted the issue to the jury upon an entirely erroneous theory.

In the case of *Finley v. Bryson*, 84 Mo. 664, 668, the supreme court treated of this question. It was there said: "The debtor must have been guilty of some material deceptive act, word or *concealment*, done or suffered by him with the intent to *induce* the opposite party to consent to the debt. The opposite party must have relied upon such false acts or manifestations of the debtor, and yielded his consent to the contract on the faith thereof. In this manner alone results a debt fraudulently contracted." The defendant's contention in the present case is based on this utterance of the supreme court. The latter clause, upon which reliance is chiefly placed, has application to cases where the debtor has been guilty of some active fraud, as some material, deceptive act or representation as to the condition of his assets, or the amount or nature of his liabilities, or as to some other affirmative matter, by which the creditor was induced to give the credit. We do not think that the court's language, either expressly or by implication, can be construed to mean that a

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design or intention not to pay an obligation does not render such debt fraudulent, so as to authorize an attachment. The court evidently had in mind cases where the debts were alleged to have been *induced* by fraud, which necessarily implies some active fraud or overt act, and not to cases where there has been a fraudulent concealment, such as the concealment of an intention never to pay the debt, which is usually unexpressed, and, therefore, could not be known to anyone except the debtor himself. In the *Bryson case* the court held that there was *no debt;* and, therefore, under the court's view of that question, there could not possibly be evidence to sustain the alleged ground of attachment. There had been a wrongful conversion of the plaintiff's property by the defendant, and the court decided that it was not permissible for the plaintiff to waive the tort and sue by attachment for the value of the property upon the idea that a debt had thus been fraudulently contracted.

In support of the action of the court in the case in hand, the well-established rule may be invoked to the effect that, when a purchaser buys on credit, knowing at the time that he is insolvent, and not intending to pay for them at all, the vendor may avoid the contract and reclaim the goods. *Bidault v. Wales*, 19 Mo. 36; s. c., 20 Mo. 550; *Fox v. Webster*, 46 Mo. 181; *Thomas v. Freligh*, 9 Mo. App. 151; *Manheimer v. Harrington*, 20 Mo. App. 297; *Herboth v. Gaal*, 47 Mo. App. 255, decided by this court at the last term. These cases recognize the vendor's right of rescission, based upon a design on the part of the vendee not to pay for the goods. But the vendor is not bound to rescind. He may enforce the contract as made. Indeed, the facts and circumstances may be such that no other remedy is available to him. If, therefore, the vendor may rescind

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a contract for such a fraud, and recover back the property sold, we can see no valid reason why the same evidence would not be sufficient and competent to prove the statutory ground of attachment, that the debt had been fraudulently contracted. Hence, we conclude that, if there was sufficient evidence in the case at bar to authorize the instructions of the court, the judgment must be affirmed.

We have read the record with care, and, while the evidence was meager and entirely circumstantial, yet we are not prepared to say that it does not support the judgment. As was said by us in the case of *Herboth v. Gaal*, *supra*, "the intention never to pay for goods purchased is one which is hardly ever provable by direct evidence, and must in almost every case be found by the jury from surrounding circumstances." The evidence concerning the defendant's subsequent conduct as to his property, and his action in reference to the payment of this particular debt, had some tendency to show that he intended not to pay the debt at the time he contracted it. We do not deem it necessary to go into this evidence, as we understand the defendant's assignment to rest on the proposition that evidence of such an intention, which in no way *induced* the contract, would have no tendency to prove that the debt was fraudulently contracted within the meaning of the attachment law.

With the concurrence of the other judges, the judgment will be affirmed. It is so ordered.

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Annie Voegeli, by Next Friend, etc., Respondent, v. The Pickel Marble & Granite Company, Appellant.

St. Louis Court of Appeals, May 10, 1892.

1. **Liability of Master for Tortious Act of Servant.** A master is responsible for the tortious act of his servant, if such act was within the scope of the servant's employment, or is shown either directly or inferentially to have been authorized by the master.

2. ———: implied authority from master. The fact that the act of the servant is unlawful will not prevent the implication of an authority for the commission of it from the employment itself. The test is not the lawfulness or the unlawfulness of the means adopted by the servant to accomplish his master's business, but it is whether such means are so far incident to the employment as to come within its scope. And *held*, in the case at bar, that authority to servants to deposit rubbish, produced by the master's business, in the street in front of the master's premises carried with it the power or duty of removing the same, and that in burning it in the street the servants acted within the scope of their authority.

3. ———: sufficiency of evidence of authority from master. *Held*, also, that proof, that the servants were accustomed to burn the rubbish thus deposited in the street by them, was some evidence of express authority from the master to them to thus dispose of the rubbish.

49	643
56	678
49	643
60	428
49	643
61	61
49	643
69	114
49	643
72	569
49	643
77	356
78	121
49	643
84	601
49	643
87	178
49	643
97	[4]570
99	[4]403
49	643
102	[5]354

4. ———: instructions. An instruction is erroneous, if it authorizes a recovery against the master for the tortious act of his servants without requiring any finding that the servants acted within the scope of their employment or by authority from the master, where this is controverted.

5. **Instructions:** omission of essential condition to right of action: effect of other instructions. If an instruction given for the plaintiff, which undertakes to state the conditions upon which his right of action is predicted, omits an essential element to such right of action, the existence of which is in dispute, the error is not cured by another instruction given for the defendant, which mentions that element as one of the conditions precedent to the plaintiff's right of recovery.

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6. **Pleading:** CONTRIBUTORY NEGLIGENCE. Contributory negligence is an affirmative defense, and, if relied on, must be pleaded. If not pleaded, the question of its existence should not be submitted to the jury as an issue of fact; in such case it will only debar a recovery by the plaintiff, when it is conclusively established by the evidence of the plaintiff himself.

7. ——: MASTER AND SERVANT. In stating a cause of action against a master for the tortious act of his servant, it is not necessary to expressly aver that the servant acted within the scope of his employment or by authority from his master; an allegation, that the defendant by its servants or agents was guilty of the negligent act complained of, implies that the act was done about the master's business and within the scope of the servant's employment.

Appeal from the St. Louis County Circuit Court.
HON. W. W. EDWARDS, Judge.

REVERSED AND REMANDED.

Rudolph Schulenburg and *G. A. Wurdeman*, for appellant.

No brief filed for respondent.

BIGGS, J.—This is an action for personal injuries, which the plaintiff alleged she received through the negligent conduct of the defendant's servants. The cause of action stated was, in substance, that the defendant's servants threw wood and other combustible material into a public street in the city of St. Louis, from its premises, and set fire to the same, thereby creating a nuisance which was dangerous and attractive to children; that the plaintiff, who at the time was five years old, was attracted by the fire and was thereby induced to play therewith, and was burned and injured thereby. The defendant's answer was a general denial. There was a change of venue from the circuit court of this city, where the suit was instituted, to the circuit court of the county of St. Louis, where on a trial before a jury there was a verdict and judgment for the plain-

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tiff for the sum of $600. The defendant has brought the case here by appeal.

The defendant complains of the action of the court in overruling its demurrer to the plaintiff's evidence; that the plaintiff's instructions are wrong; that the court erred in refusing the defendant's instructions on the question of contributory negligence; and that the court committed error in refusing to arrest the judgment. We will notice the errors assigned in the order stated.

The argument of the defendant's counsel in support of the first assignment is predicated on the rule, that a master is not liable for the tortious acts of his servants, unless the act complained of from its nature is within the scope of the servant's employment, or is shown either directly or inferentially to have been authorized by the master. The contention is that the plaintiff's evidence had no tendency to prove either state of facts. There is no difficulty about stating the rule of law which is to govern in determining the master's liability in such cases, but the difficulty which courts and juries encounter is in its application. Mr. Wood, in his work on master and servant, treats of the question in this way: "No decisive test can be given, but in all cases the act must have been done while engaged in the prosecution of some business for the master, and that business must have been such as the servant had authority from the master to do; that is, he must have been authorized, either expressly or impliedly, to do the act in some manner, which he has improperly or wrongfully performed, and the fact that he was only authorized to do the act in a *certain way* does not save the master from liability. If he was authorized to do the act at all, the master is liable for the consequences of his doing it in a *different manner*, if the mode adopted by him is so far *incident* to the

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employment that it comes within its scope, for having given the servant any authority in the premises, he alone must suffer for its abuse. He has set the wrong in motion, and must abide the consequences as against innocent parties." Wood on Master & Servant [2 Ed.] sec. 309. We think that the foregoing quotation is as lucid a statement of the modern doctrine as it is possible to make.

Now, let us examine the plaintiff's evidence for the purpose of applying the law. This evidence tended to show that the defendant was engaged in the marble business; that its premises fronted on Labaume street, which is a public street; that its servants were in the habit of throwing into this street marble chips, pieces of lumber, shavings and other combustible material, and that this rubbish had been on several occasions prior to the accident burned up in the street. It is conceded that, a short time before the plaintiff was burned, shavings and other materials, which had been deposited on the street by the defendant's servants, were set on fire, but the evidence failed to show who started the fire. However, one or two of the plaintiff's witnesses testified that, after the first lot of rubbish had partially burned, but prior to the accident, one of the defendant's servants brought from the defendant's premises additional material and threw it on the fire. The plaintiff's evidence also tended to show that she and other small children were delving in the embers for nails, and that, while so doing, her clothing caught on fire, thereby causing the injuries complained of.

It is not controverted that the burning of the rubbish in the public street was an attractive danger which in its nature was likely to attract children; but the contention is that the plaintiff's evidence failed to connect the defendant with the wrong, and that, therefore, its demurrer to the evidence ought to have been

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sustained. We cannot agree to the proposition, that the plaintiff's evidence furnished no substantial proof that the rubbish was set on fire by the defendant's servants. There was evidence that, prior to this, the rubbish had been burned by some one, and there was direct proof that, on the morning of the accident, one of the defendant's servants renewed the fire by placing on it additional materials, which had been carried from the defendant's premises. From these facts the inference was a fair one, that the defendant's servants had been in the habit of depositing the materials in the street and burning them up, and that they started the fire on the morning the plaintiff received her injuries. We are also of the opinion that this evidence shows that the act of burning the rubbish was within the scope of their employment. The depositing of the rubbish in the street must be regarded as a temporary disposition of it, for otherwise it would have amounted to an unlawful obstruction of the street. Its prompt removal in some way would necessarily be one of the *implied* duties resting on the defendant's servants in carrying on the business. But it is said that the burning of the rubbish was an unlawful act, and that, therefore, authority to do so could not be implied by reason of the employment merely; that express authority from the master must be shown in order to make him liable therefor. The doctrine of the early English cases would seem to lead to this conclusion, but the modern decisions, both in England and America, agree with Mr. Wood in his statement of the law. The test is not the lawfulness or the unlawfulness of the means adopted by the servant to accomplish his master's business, but it is whether such means are so far incident to the employment as to come within its scope. The case of *Jones v. Packet Co.*, 43 Mo. App. 398, illustrates this principle. There the plaintiff was

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in the employ of the defendant as a deckhand. He complained that the mate of the boat, whom the defendant had placed as a boss over the crew, had assaulted and beat him for the purpose of compelling him to work. We held that the right of the mate to use force in the execution of his master's orders could not be implied from his employment merely; that the employment only implied the right to use *words* of command, and not the power *to assault* the plaintiff, if the mate deemed it necessary to the doing of the master's business. In the opinion on the motion for a rehearing Judge Rombauer very clearly drew the distinction between the principles governing that case and those applied in the case of *Levi v. Brooks*, 121 Mass. 501. There the defendant's servant was intrusted with the seizure of goods, and in doing so he used force. The plaintiff complained of this, and the master was held on the ground that the authority to seize the goods *impliedly authorized the use of force in case of resistance.* So, in the case before us, we think that the authority conferred by the defendant on its servants to place the rubbish in the street carried with it the power or duty of removal, and, if the servants adopted unlawful means for the accomplishment of this duty, or even in so doing disregarded the defendant's express commands as to the mode, the defendant must answer for the resulting damages. But, if we are wrong as to the implied authority of removal, the evidence, which tends to prove that the defendant's servants had been accustomed to burn the trash, also furnished some evidence of express authority to so dispose of it. *Reilly v. Railroad*, 94 Mo. 600. Hence, we conclude that under any view of the law the questions of fact presented by this assignment were properly submitted to the jury. This assignment will be overruled.

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The court, upon the plaintiff's request, gave the following instruction, which was the only instruction given for plaintiff stating the conditions of defendant's liability: "If the jury find from the evidence in this case that Labaume street at the place mentioned was on the tenth day of April, 1890, an open public street of the city of St. Louis; and if the jury further find from the evidence that Martin Voegeli was appointed the next friend of the plaintiff before this suit was, brought; and if the jury further find from the evidence that on the tenth day of April, 1890, *the defendant's servants placed in said street certain rubbish and combustible material and set fire to same*, and that said rubbish so set on fire in said street was an attraction to children to play therewith; and if the jury further find from the evidence that said material so set on fire in said street was dangerous to children on said street; and if the jury further find from the evidence that the plaintiff Annie was at said time a child between five and six years of age, and that she was attracted to said fire to play therewith, and that, while doing so, she had her clothes take fire and burn and injure her, *then the plaintiff is entitled to recover.*" (The italics are our own.)

This instruction is challenged by the defendant as laying down an incorrect proposition of law, and touching that fact there can be no controversy whatever, because the defendant's liability does not depend upon the fact whether *servants in its employ* placed the rubbish in the street and set fire to it, but whether its servants did so while engaged in its business and while acting within the scope of their employment. *Snyder v. Railroad*, 60 Mo. 413; *Farber v. Railroad*, 32 Mo. App. 378. Under the instruction as drawn, the defendant would be liable, if any of its servants had placed the rubbish in the street, and if any of its servants

had set fire to it, which, as above seen, is not the law.

The error in the instruction being thus unquestioned, the only remaining question is whether such error was rendered unprejudicial by the fact, that the court upon defendant's request gave an instruction, which told the jury that the defendant was not responsible, unless the jury found that said employes or servants in kindling said fire acted within the scope of their employment, or that the kindling of said fire was authorized or ordered by the said defendant corporation.

The question presented is, *first*, was there any inconsistency between these two instructions, and, if not, *then* was the apparent vice in the plaintiff's instruction helped out by the defendant's instruction. It would seem that there is an apparent inconsistency between these two instructions, because the plaintiff's instruction makes the defendant liable if any of its servants did the act, whereas the defendant's instruction tells them that the defendant is not responsible, unless the servants doing the act did so by order of their employer, or within the scope of their business.

The early rule in this state was that instructions must be so framed, as not to exclude from the consideration of the jury points which are fairly raised by the evidence on either side. *Clark v. Hammerle*, 27 Mo. 70; *Sawyer v. Railroad*, 37 Mo. 263; *Fitzgerald v. Hayward*, 50 Mo. 516. As was properly said by Judge Bliss in *Goetz v. Railroad*, 50 Mo. 474, an instruction in itself erroneous, given on part of the plaintiff, cannot be supplied by an instruction given on behalf of the defendant. The fact, that it is contradicted by one on defendant's behalf, tends rather to confuse than to enlighten the jury. An ambiguous or general term in an instruction may be explained by another, and a

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partial view may sometimes be supplied, but the whole should be consistent and harmonious. It was properly remarked by Judge LEWIS in *State v. Nauert*, 2 Mo. App. 295, that a contradiction between two instructions, so far as correcting the evils in either, multiplies them in both.

An apparent departure from this salutary rule is claimed to be found in a series of cases beginning with *Karle v. Railroad*, 55 Mo. 476. It was there stated that all instructions in a case must be considered together as if forming one series. But, in applying the rule in a particular complaint made in that case, Judge NAPTON stated that the instruction complained of *manifestly implies* what the defendant's instructions more fully *assert*, which simply reiterates the view of Judge BLISS, that a general term in an instruction may be explained by another. That case, however, as well as the subsequent cases of *Muehlhausen v. Railroad*, 91 Mo. 332, and *Owens v. Railroad*, 95 Mo. 181 (in which two of the judges dissented), asserts the qualification, that, before one instruction can thus be supplied by another, they must be consistent and not misleading in their tendency. In *Daugherty v. Railroad*, 97 Mo. 647, 663, the court seemed inclined to adhere more to the rule established in the earlier cases. Several instructions given for the plaintiff were complained of. In its first opinion, the court, speaking through Judge RAY with reference to one of these instructions, says: "If, however, by reason of its construction it may be somewhat involved, or obscure, the other instructions in the cause unquestionably remedy that defect." The learned judge adhered to that view on rehearing, but Judges SHERWOOD, BLACK and BRACE would not adhere to it, and the judgment was reversed for error in these instructions. Finally, in the case of *Schroeder v. Michel*, 98 Mo. 43, 48, the entire court endeavored,

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in a *per curiam* opinion to which all judges could agree, to formulate a rule which was done in the following words:

"It is undoubtedly better and more logical practice for every instruction, assuming to state the facts necessary to a verdict for plaintiff, to refer to such *affirmative defenses* as the case may present. But whether or not the omission to do so constitutes reversible error will greatly depend on the language of the different instructions in each particular case. If the qualification of the instruction complained of appears elsewhere in a form fairly bringing it to the attention of the jury as a modification of the other, the judgment will not, on that account, be reversed."

We have italicized the words, affirmative defenses, because almost every case wherein the question arose was one where an instruction given for the plaintiff failed to submit to the jury an affirmative defense advanced by the defendant, such as contributory negligence or limitation. We assume no case can be found, where the plaintiff's instruction on his own case states erroneous precedent conditions of recovery, and yet where it was held that the defendant's negative instruction was sufficient to supply the affirmative instruction of the plaintiff.

In cases where the defenses are affirmative the petition need not anticipate and avoid the effect of such defenses, and, hence, there is some plausibility in the argument, that the plaintiff's instructions are not necessarily erroneous because they fail to call attention to the evidence in support of purely affirmative defenses, provided always the defendant's instructions supply the omission; but with what show of reason can that argument be made, where the plaintiff's instructions omit essential conditions of his right of recovery, regardless of any affirmative defenses interposed. In the case at

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bar it was not for the defendant to show that the persons setting fire to the rubbish were not its servants acting within the scope of their employment, but it was for the plaintiff to show both these facts as a condition precedent to their recovery. An instruction, therefore, which tells the jury in unmistakable terms that the defendant was responsible if any of its servants did the act, was clearly misleading.

The defendant also complains of the action of the court in refusing to submit to the jury the question of contributory negligence. It is well-settled law in this state that contributory negligence is an affirmative defense, and, if relied on, must be set out in the answer. The defendant undertakes to avoid this by invoking the rule that, when the plaintiff's own evidence makes out a case of contributory negligence, there can be no recovery. This is perfectly clear, but the plaintiff's evidence must be of such a character as to enable the court to say, as matter of law, that the plaintiff has been guilty of such contributory negligence as would defeat the action. If the question is a debatable one, then it is error to submit it, where the defendant has failed to make the defense in the answer. In the present case it is sufficient to say that, under any circumstances, it would be error for a court to decide, as a matter of law, that a child of five years has been guilty of contributory negligence. If it could be made a question at all, it would be one of fact for the jury, and, as the defendant failed to make the defense by answer, it was not entitled to have the question submitted.

Lastly, the defendant insists that the motion in arrest should have been sustained, because the petition failed to state that, when the defendant's servants threw the rubbish in the streets and lit the same, they were in the employ of the defendant and engaged upon the business thereof, and failed to state the circum-

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stances bringing such act within the particular course of their employment. The supreme court in *Travers v. Railroad*, 63 Mo. 421, decided that it was not necessary to aver such facts. In the case of *Cousins v. Railroad*, 66 Mo. 572, the petition alleged that at the time of the accident the engine was in charge of the defendant's servants. The answer was a general denial. The real defense was that the engine at the time the injuries were inflicted was not in charge of the defendant's servants, or that they were engaged in the defendant's business. It was held that the defense was admissible under the general issue. These cases proceed upon the theory, and properly so we think, that an allegation, that the defendant by its agents or servants was guilty of a negligent act, implies that the act was done about the master's business, and within the scope of the servant's employment. We will overrule likewise this assignment.

For the error in the plaintiff's instruction the judgment of the circuit court will be reversed and the cause remanded. All the judges concur.

W. A. LOCKART, Appellant, v. A. A. FORSYTHE AND NANCY C. FORSYTHE, Executors of HARRIS FORSYTHE, Deceased, Respondents.

St. Louis Court of Appeals, May 10, 1892.

1. **Administration:** ALLOWANCE OF DEMANDS CREATED AFTER DECEASE OF THE DECEDENT: POWER COUPLED WITH INTEREST. A power coupled with an interest survives the death of the grantor of it; and when such power authorizes the grantee of it to contract debts and charge the grantor therewith—as was held to be the case herein—a debt contracted by the grantee in pursuance of it, though after the death of the grantor, may be presented and allowed as a demand against the estate of the latter.

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2. **Contract:** EFFECT OF DEATH OF PARTY: POWERS OF LEGAL REPRESENTATIVES. Whether a contract establishes a personal relation between the parties, or does more, so that it will survive the death of one of the parties, and can be executed by his legal representatives, depends upon the intention of the parties, unless the intention is such as the law will not enforce. And *held*, that the contract in question herein did not terminate with the death of one of the parties, since the continued execution of it, though involving the exercise of a certain amount of business judgment on the part of the legal representatives of the decedent, did not impose on such legal representatives any active duty in the management of the business provided for by it.

Appeal from the Lawrence Circuit Court.—HON. M. G. McGREGOR, Judge.

REVERSED AND REMANDED.

Norman Gibbs, for appellant.

R. H. Landrum and *Joseph French*, for respondents.

BIGGS, J.—Harris Forsythe died testate in Lawrence county on the first day of April, 1887. The defendants, having been named as executors in the will, duly qualified as such, and took upon themselves the administration of the estate. The plaintiff presented to the probate court a demand which he asked to be allowed against the estate. The claim was for the value of certain corn claimed by the plaintiff, which he alleged had been taken by the defendant's agent in the years 1887 and 1888, and by him fed to stock belonging to said estate. Both the probate and circuit courts rejected the demand, and the plaintiff has brought the case here by appeal.

The facts, upon which the plaintiff rests the right to have his claim allowed and paid out of the assets of the estate, may be thus briefly stated: It was claimed by him that, about one year prior to the death of Forsythe, he (Forsythe) entered into a written con-

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tract with one Joseph S. Price, in which the parties respectively agreed and contracted that Price should cultivate at his own expense a farm belonging to Forsythe for the term of three years, and that, in consideration of this, the latter agreed to furnish the money to buy forty or fifty head of young mules each year, and such other live stock as the parties might agree on, and that the proceeds arising from the sale of the stock, less the amount of money advanced by Forsythe, was to be divided equally between the parties; that, at the time Forsythe died, this contract had two years to run, and that the executors undertook to and did carry it out by furnishing Price with money to buy feed for the stock which was on hand at the time of Forsythe's death, and also additional sums during the years 1887 and 1888 to purchase other stock and the necessary food for the same. The plaintiff established the foregoing facts by A. Forsythe, one of the executors. The court also permitted the plaintiff to introduce evidence tending to show that Price, during the years 1887 and 1888, fed to the live stock, in which he and the estate were interested, a large amount of corn which had grown on the plaintiff's farm; but the court refused to allow the plaintiff to show that this corn belonged to him, and that he had never received any pay therefor. The written contract between Forsythe and Price was proven and offered in evidence, but the court excluded it. The plaintiff also offered in evidence the settlements of the executors with the probate court for the purpose of showing the disbursement of money to Price to pay for feed and stock, and also receipts for the sale of the stock; and also to show that the execution of the contract with Price had been a source of profit to the estate, and, further, that the actions and doings of the executors in the premises had received the sanction of the probate court. Thereupon,

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the court instructed the jury that, under the law and the evidence, the verdict should be for the defendants. The action of the court in rejecting this evidence and in giving this instruction constitutes the plaintiff's ground of complaint on this appeal.

The questions to be answered on this record depend upon the construction of the written contract between Forsythe and Price. If by its terms Price was constituted the agent of Forsythe with authority merely to buy stock and the necessary feed for them, and Price was *only* interested in the profits, then the contract terminated with the death of Forsythe. *Hunt v. Rousmanier*, 8 Wheat. 174. The same result would follow if the contract established a copartnership. In either case, if a subsequent arrangement was made between Price and the executors for a continuation of the business by which debts were contracted, Price and the executors as individuals might be held for such debts, but not the estate. But, on the other hand, if Price's agency was coupled with an interest in the subject-matter of the business, then the contract survived, and Price had the right to carry it out; and, if the executors had refused to furnish the necessary money for its execution, then he would have been entitled to a judgment against the estate for damages for its breach. The contract is as follows:

"STATE OF MISSOURI, }
"County of Lawrence. }

"*Know all men by these presents:* That I, H. Forsythe, of the first part, and Joseph Price, of the second part, enter into this agreement: *First*, that I, H. Forsythe, of the first part, do (*sic*) agree to furnish to Joseph Price, of the second part, my entire farm, consisting of three hundred and ninety acres, it to be turned over in good repair to said Price, and he to take

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said farm and furnish teams to run same; also to be at all expense of running said farm, and keeping same in good repair at his expense. And H. Forsythe, of the first part, is to furnish money to buy young mules, from forty to sixty each year, as both parties may deem proper, to be kept on said farm; also any other stock that we may want on said farm. And said Price shall have for his services as manager of said farm one-half the profits coming out of stock kept on said farm, when sold, after the said purchase money has all been deducted from sales off of said farm, the labor in cultivating said farm and buying stock for said farm to all be done by party of the second part, at his expense. The jack Alfonso, and horse Tuckaho, to be owned by Forsythe and Price, the profits to be divided equally at end of each year.

"The said Joseph Price to give his exclusive attention to said farm and stock, signed this first day of April, 1886.

"In addition to the above, business shall run at least three years, and as much longer as both parties may agree.

"Signed this twenty-third day of April, 1886.

"H. FORSYTHE,
"J. S. PRICE."

"One day after date I promise to pay H. Forsythe $493, value received, interest ten per cent. from date.

"J. S. PRICE."

The foregoing contract and note were written with a lead pencil on the same paper, and on the margin of the paper against the note is written in ink the following, to-wit: "Paid March 9, 1889."

Was Price's agency of such a character as to survive or continue after the death of Forsythe? Chief Justice MARSHALL, in *Hunt v. Rousmanier*, 8 Wheat. 174, 203, explained what was meant by the phrase, a

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"power or agency coupled with an interest." He said: "Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest, which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing." In explanation of this principle it is also said in the opinion: "The interest or title in the thing being vested in the person who gives the power remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his own estate. The legal reason which limits a power to the life of a person giving it exists no longer, and the rule ceases with the reason on which it is founded."

The proper interpretation of the contract before us, as applicable to the rights of the present litigants, is by no means free of difficulty. It may be safely said, we think, that under the decisions in this state there was, strictly speaking, no partnership between Forsythe and Price. *Donnell v. Harshe*, 67 Mo. 170; *Musser v. Brink*, 68 Mo. 242; *Newberger v. Friede*, 23 Mo. App.

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631. Neither can it be said that Price was simply employed as the agent of Forsythe to buy and feed stock, and that he was to be compensated for his labor by a division of the proceeds of sales. For, if such was the contract, Forsythe had the right to revoke the agency at any time, and it was necessarily revoked by his death. But we encounter difficulties in applying the principle laid down in the case of *Hunt v. Rousmanier*, *supra*, and other authorities as applicable to an agency coupled with an interest. That Price was vested with an interest in the jack and stallion, and in all stock purchased, we think admits of no doubt. As a test of this neither Forsythe nor his executors could have deprived Price of the possession of the property and put him to his action for damages. And it seems equally clear that Price had the right to contract for the purchase and sale of stock, and the necessary feed for the same, in his own name. But the trouble with us is, that the scope of the agency beyond certain limits was by the contract made to depend upon the judgment of both parties, and thus the question is presented, whether or not Price's agency does not fall within that class where the employment is irrevocable during the life of the grantor, but by its very nature must cease at his death.

In the case of *Yerrington v. Greene*, 7 R. I. 589, the deceased, who was a manufacturer of jewelry, employed the plaintiff for a period of three years to take charge of the branch office of the deceased in the city of New York at a stated annual salary. The deceased died during the time. His executors closed out the business in New York, and the plaintiff brought his action for damages against the estate for a breach of the contract. The court, after stating the general rule that unexecuted contracts are not rescinded by the death of one of the contracting parties, but according

to their nature must either be specifically performed by the representatives of the deceased contracting party, or must be rescinded by agreement, proceeds to state an exception to the rule. It was said: "An exception to this rule, equally well established at both the civil and common law, is, that in contracts in which performance depends upon the continued existence of a certain person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse performance. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued existence of the particular person or chattel." Many cases are there stated where this exception would govern. For instance, where one party to a contract of marriage dies; the death of an author or artist before a book or picture is completed; the death of a slave before the day set for delivery, or the death of the master or apprentice before the expiration of the time of service. The court there held that the case then under consideration was within the exception.

The case of *Dickinson v. Callahan*, 19 Pa. St. 227, discusses the same principle. There A agreed to sell to B all lumber sawed at his mill during five years, the quantity to be equal to an average of three hundred thousand feet annually. Both parties to the contract died before the expiration of the time. The representatives of B sought in the action to hold the representatives of A for damages for failure to perform the contract. The supreme court of Pennsylvania, in discussing this alleged liability, said: "Does such a contract establish anything more than a personal relation between the parties? This is a mere question of construction, depending upon the intention of the

parties, unless the intention be such as the law will not enforce. Is it probable that either party intended to bind his executors or administrators to such a relation? The contract does not say so, and we think it did not mean it; for it would involve the intention that the administrators of one shall be lumber merchants, and those of the other sawyers. The character of the contract demands not such a construction; for each delivery under it is necessarily of complete and independent articles, and each delivery was to be at once a finished work on each side. There may be cases where it is necessary that the executor or administrator shall complete a work already begun by the decedent, and then they may recover in their representative character; but here every act of both parties was complete in itself." The court then proceeds also to argue that a performance of the contract in question was incompatible with the office of an administrator, for it would require him to take possession of and run the saw mill, etc.

Neither one of the cases cited is like the one before us as to its controlling facts, but the discussion in each of the opinions throws some light on the question which is troubling us; that is, whether, from the nature of the contract and its terms, the parties contemplated that Price's agency should be revoked in case of the death of Forsythe. If they did, then the judgment of the circuit court was right, because, if the agency terminated with the death of Forsythe, Price could not bind his estate. It will be observed that the intention of the contracting parties in each individual case must control, if it is such as the law will enforce. In the *Dickinson case*, the court held as a matter of construction that the contract created merely a personal relation, and that it necessarily ceased with the death of A. This conclusion was reached upon the theory, that each delivery of lumber was a complete act within itself,

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leaving nothing unfinished pertaining to it; that the execution of the contract by the executors of A would require the running of the saw mill, which would involve the estate in new and varied complications, and exact of the executors the exercise of a peculiar skill, and would impose on them labors and duties not contemplated by law. These reasons furnish the basis for the court's interpretation of the contract.

Do these arguments obtain in the case before us? In a measure they do, but not to the extent which would lead us to a similar conclusion. The business contemplated by Forsythe and Price was the purchase and sale of young mules and other live stock. Forsythe was to furnish the money, and Price was to buy, feed and sell the stock, and also to cultivate the farm at his own expense. Our common experience teaches us that the profitable prosecution of such a business requires time. The profit is in the growth of the stock. Therefore, it is not reasonable to suppose that Price would have entered into such a contract, if it was intended by the parties that the business should terminate if Forsythe should die. Price in all probability expended a good deal of money in making preparations to carry on a farm of four or five hundred acres for three years, and he could not have reasonably expected to receive any profits short of the limitation fixed by the contract. To this extent the reasoning of the *Dickinson case* is inapplicable.

But it will be observed that, beyond a certain number of mules to be purchased, or other live stock, it required the exercise of the mutual judgment of the parties, not in making the purchase but in determining whether the additional stock should be bought. The question, therefore, presents itself, whether the exercise of such judgment was incompatible with the duties of Forsythe's executors. We think there is a good deal of

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difference between the exercise of such judgment and discretion, and the running of a saw mill for four or five years. In determining what additional stock, if any, should be bought, it only required the exercise of ordinary business judgment which all executors are supposed to possess. The continuation of the business imposed no active duties on them in reference to its management.

We, therefore, conclude that Price's agency survived, and, as there was no legal obstacle in the way of the enforcement of the contract by Forsythe's executors, and as they elected to and did carry it out, all acts of Price, within the scope of the business, bound the estate. Under this view the court committed error in excluding the plaintiff's evidence. If Price fed the plaintiff's corn to stock belonging to himself and the estate, then the plaintiff is entitled to an allowance for its reasonable value, unless the plaintiff acted in such a way in reference to the corn as to estop him from insisting on payment. There is some evidence looking in that direction.

With the concurrence of the other judges, the judgment of the circuit court will be reversed and the cause remanded. It is so ordered. Judge ROMBAUER concurs in the result only.

F. J. KELM, Respondent, v. GEORGE HUNKLER, Appellant.

St. Louis Court of Appeals, May 10, 1892.

1. **Justices' Courts:** APPEALS: JURISDICTION OF APPELLATE COURT. The jurisdiction of the circuit court in cases appealed to it from justices of the peace is acquired in a special and statutory manner, and it is necessary in every such case that it should appear somewhere from the record that an appeal was granted in compliance with law.

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2. ——: ——: **RULE ON JUSTICE TO ALLOW APPEAL.** A rule on a justice of the peace to allow an appeal from a judgment rendered by him is not authorized by section 6333 of the Revised Statutes of 1889, when it does not appear that the party moving for the rule tendered, or was ready to perfect, the bond for the appeal within the prescribed time; the mere fact that such party called at the justice's office within that time with an intention to appeal, but failed to meet the justice, will not suffice.

Appeal from the St. Louis County Circuit Court. HON. W. W. EDWARDS, Judge.

REVERSED AND REMANDED (*with directions*).

Alfred Gfeller and *John R. Warfield*, for appellant.

The circuit court of St. Louis county never acquired jurisdiction in the cause, and the judgment rendered herein is void. *Brown v. Woody*, 64 Mo. 547. There must be an order from the court below granting an appeal, and unless such order appears on record the case must be stricken from the docket. *Waddell v. Blackstone*, 59 Mo. 120; R. S. 1889, sec. 6332. An appeal from a justice is not taken, until a recognizance is entered into and approved by the justice. *Slater v. Steamboat*, 10 Mo. 513; *Filley v. Walls*, 4 Mo. 271; *Cochran v. Bird*, 2 Mo. 141; *James v. Robinson*, 1 Mo. 595; R. S. 1889, secs. 6328, 6329. The recognizance is void, if not approved by the justice. *Cockrill v. Owen*, 10 Mo. 287. In all classes of appeals from one court to another it is a fundamental principle, that it is essential to the jurisdiction of the appellate court that the appeal was taken within the time and in the manner prescribed by law, and that, where it is not so taken, the appellate court has no jurisdiction to proceed to an examination of the merits, but must strike the cause from its docket, where there are no statutory directions to do otherwise, or dismiss the appeal, or affirm the judgment where

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there is a statutory direction to take this course. *Green v. Costello*, 35 Mo. App. 134.

Joseph T. Tatum, for respondent.

THOMPSON, J.—This cause was commenced before a justice of the peace in St. Louis county, and transferred by change of venue to another justice, before whom such proceedings were had that, on the thirtieth day of August, 1890, a trial took place between the parties, and the justice made a finding in favor of the plaintiff in the sum of $95, and in favor of the defendant on the counterclaim by him filed in the sum of $63.50, and rendered judgment in favor of the plaintiff for the difference between these two sums, namely, $31.50, and also for the costs. On the same day the defendant paid into court this judgment and costs. According to the justice's transcript no further proceedings took place before him until, on the twenty-second day of November, 1890, he was served with a citation from the circuit court to show cause why an appeal should not be allowed in the case. On the same day he filed an answer to the citation, and on November 24, 1890, he received an order of the circuit court to allow an appeal and transfer the cause to that court, which he accordingly obeyed.

Turning now to the record of the circuit court, we find that, on the fifteenth day of November, 1890, the plaintiff appeared in that court, and, so far as appears, without giving any notice to the defendant, filed the following application for a citation upon the justice, to show cause why he should not allow the plaintiff an appeal to the circuit court:

"F. J. Kelm, of lawful age, being first duly sworn, on his oath says that, during the month of August, 1890, he instituted suit before Hugo S. Jacobi, a justice of the peace for Bonhomme township, St. Louis

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county, Missouri; and that subsequently defendant took a change of venue and the cause was sent to W. H. Sappington, a justice of the peace for Carondelet township, St. Louis county, Missouri, where, on the twenty-seventh day of August, 1890, the cause was tried and finally submitted to said Justice Sappington, who took the cause under advisement and subsequently thereto decided the cause in favor of plaintiff on his claim, but allowed a counterclaim in favor of defendant; that affiant is a non-resident of St. Louis county; he was when said cause was instituted, when it was tried and decided, and still is a resident of the city of St. Louis; that, within twenty days after the trial and decision in said cause, said affiant and plaintiff went to both the residence and the office of the said last-named justice, prepared to take an appeal from the decision of said justice, and that on two several occasions he went to said places and could not find said Justice Sappington, either at his house or office, and, because of the absence of said justice, plaintiff could not obtain an appeal within the time required by law. Wherefore, the premises considered, the affiant and plaintiff prays for a rule and attachment on said Justice Sappington to compel him to allow an appeal herein, and return his proceedings in the suit, together with the papers required to be returned by him if appeal had been allowed in time. F. J. KELM,

"W. T. BODLEY,

"Attorney for Plaintiff."

Upon this application the court granted a rule upon the justice to show cause on the twenty-second of November, 1890, why he should not be ordered to grant an appeal in the case. On the twenty-fourth day of November, 1890, the justice, in obedience to this rule, answered and showed cause under oath as follows:

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"I, Wm. H. Sappington, a justice of the peace within and for Carondelet township of said county, having been cited to appear before said court on this twenty-second day of November, 1890, to show cause why an appeal has not been granted to plaintiff in above styled cause, for answer to said citation make answer as follows: *First.* That the reason that an appeal was not granted in said cause was because the plaintiff, nor his attorney, never made the proper application therefor, by filing an affidavit and bond as required by law. *Second.* That the only intimation that the said justice ever had that plaintiff desired to take an appeal was by a note, left at his office on the nineteenth day of September, 1890, it being the last day on which an appeal could be granted in said cause. *Third.* That said justice was ready and willing, at any time and all times, to grant the plaintiff an appeal in said cause upon his complying with the law.

"W. H. SAPPINGTON."

Accompanying this answer of the justice was the following letter written by the plaintiff, and bearing date September 19, 1890, which, it will be perceived, was the day of the expiration of the twenty days from the date of the justice's judgment, and, consequently, the last day on which the justice could have granted an appeal, assuming, as the petition for the allowance of the appeal states, that the plaintiff was a non-resident of the county:

"SAPPINGTON, MO., September 19, 1890.

"*Mr. Sappington, Esq.*

"SIR:—I have being out here twice to see you, but failed to see you, so I want to let you know that I will take an appeal in the matter, and, as you will be so kind and send me the bond, I will fill it out with good security—one is Mr. Bodley and the other is my brother; he

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would be sufficient by himself; he is worth about $40,000. I will have the bond sined before a notary repb.

"Very resp.

"F. J. KELM."

Thereupon the circuit court entered the following order, requiring the justice to grant the appeal: "The court, having duly considered the said return, doth order that the said justice grant the said plaintiff an appeal in this cause to this court, upon the filing of a good and sufficient appeal bond, to be approved by said justice." An appeal bond bearing date November 22, 1890, and containing in its caption the recital, "Before Wm. H. Sappington, justice of the peace, Carondelet township," and signed by the plaintiff and one surety, and otherwise apparently conditioned according to law, is copied into the bill of exceptions, but it contains no indorsement showing that it was approved by the justice. Nor does it appear by a recital of the clerk of the circuit court, or otherwise, how it got into the circuit court. There is nothing to show that it was the bond required by the order of the court allowing the appeal, which was entered two days after the *teste* of this bond; nor does it appear, by a recital of the clerk, or otherwise, how it got into the record, or that it was ever approved by anyone authorized to take and approve such a bond.

The next step in the progress of this cause took place at the following term of the court, at which term the defendant appeared and filed a motion to dismiss the appeal on the following grounds: "*First.* That no appeal had been taken or perfected in said cause within the time allowed by law. *Second.* That no appeal from the judgment of the justice therein was ever properly taken, granted or allowed. *Third.* That the judgment of the justice had been fully paid and satisfied by said defendant."

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This motion coming on to be heard by the court, the defendant in support of it offered testimony tending to show that no affidavit for appeal was made, or bond tendered or given by the plaintiff, or anyone for him, upon said appeal, or any application to the justice made by plaintiff for such appeal, until more than twenty days after the rendition of the judgment of the justice therein. To the introduction of which evidence the plaintiff objected, which objection the court sustained, and the defendant excepted. Thereafter, the motion being submitted, the court overruled it, and the defendant again excepted.

Thereafter the cause was called for trial on the merits, and, a jury being impaneled and evidence having been heard, there was a verdict for the plaintiff in the sum of $93 on his cause of action, and for the defendant in the sum of $23.50 on his counterclaim; and the court thereupon entered judgment in favor of the plaintiff in the sum of $69.50, to reverse which the defendant prosecutes his appeal.

The first error which is assigned is, that the circuit court erred in making the order upon the justice to grant the appeal, and in subsequently overruling the defendant's motion to dismiss the appeal. This question must be carefully considered, because it lies at the foundation of the jurisdiction of the circuit court and of this court. The jurisdiction of the circuit court in cases appealed to it from justices of the peace is acquired in a special and statutory manner, and it is necessary in every case that it should appear somewhere by the record that an appeal was granted in compliance with law.

The statutes which govern the question before us are as follows:

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"No appeal shall be allowed in any case, unless the following requisites be complied with: *First*, the appeal must be made within ten days after the judgment was rendered, but, if a non-resident of the county where the suit shall be instituted, the party shall, in all cases of appeal allowed by this article, have twenty days to make such appeal; *second*, the applicant, or some person for him, together with one or more solvent sureties, to be approved by the justice, must, within the time prescribed in the first clause of this section, enter into a recognizance before the justice to the adverse party, in a sum sufficient to secure the payment of such judgment and the costs of appeal, conditioned that the applicant will prosecute his appeal with due diligence to a decision, and that if on such appeal the judgment of the justice be affirmed, or upon a trial anew in the appellate court judgment be given against him, he will pay such judgment, and that, if his appeal be dismissed, he will pay the judgment of the justice, together with the costs of the appeal." R. S. 1889, sec. 6328. It will be perceived that this statute is negative and prohibitory, and, consequently, that the justice cannot allow an appeal, where the party desiring to appeal is a non-resident of the county, unless within twenty days from the judgment such party enter into the recognizance therein prescribed.

The next section bearing upon the question is as follows:

"No appeal shall be allowed unless the party applying therefor, or some person for him, will make affidavit that the application for an appeal is not made for vexation or delay, but because he believes the appellant is injured by the judgment of the justice, and stating whether such appeal is from the merits or from an order or judgment taxing costs." R. S., sec. 6330.

The next applicatory section is as follows:

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"The affidavit may be taken by an officer qualified to administer oaths, and shall be filed with the justice when the application for appeal shall be made. Upon request, it shall be the duty of the justice to prepare the affidavit or recognizance." R. S., sec. 6331.

The statute under which the circuit court proceeded, in allowing the appeal, is as follows:

"If the justice fail to allow an appeal in the cause, when the same ought to be allowed, or if, by absence, sickness or any other cause on his part, an appeal cannot be taken in time, the circuit court or other court having jurisdiction of such appeal, or judge thereof in vacation, on such fact satisfactorily appearing, may, by rule and attachment, compel the justice to allow the same, and to return his proceedings in the suit, together with the papers required to be returned by him." R. S., sec. 6333.

Another section may be quoted as having some bearing on the inquiry before us. It reads as follows:

"If in any case the justice shall allow an appeal, and certify in his certificate the cause of his failure to allow the same at the proper time, such appeal shall be sustained when it would have been competent for the court to have ordered the same to be allowed, and in all cases when the bond and affidavit required shall have been filed or deposited with the justice in due time, and the justice shall have returned such appeal to the appellate court, the same shall be considered as having been allowed by the justice, although no entry thereof shall appear in the record." R. S., sec. 6334.

From these statutory provisions it appears that an application for an appeal can only be made by the act of the party, who desires to appeal, in appearing before the justice before the expiration of the prescribed time, and tendering the statutory bond and affidavit, or requesting the justice to prepare such bond and affi-

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davit. In the case before us it nowhere appears from any part of the record that the plaintiff, within the twenty days allowed him by law for taking the appeal, appeared at the office of the justice and exhibited the statutory affidavit and bond, or requested the justice to prepare them for him; but it may fairly be concluded from the return of the justice and the letter of the plaintiff, which he annexes as an exhibit thereto, that the plaintiff did, on the last day allowed by law for taking the appeal, appear at the office of the justice, and, finding him absent, did leave there the letter above buoted, requesting the justice to send him an appeal bond, which he promised to execute before a notary public with good security. But it does not appear that he was ready on that day with his sureties, or that the bond could have been perfected, if the justice had been found at his office or residence. On the contrary the justice returns under oath to the order to show cause that the reason why he did not grant an appeal was, that neither the plaintiff nor his attorney had ever made the proper application therefor, by filing an affidavit and bond as required by law.

There is still another reason why we must conclude that no appeal from the justice to the circuit court was taken and perfected, as required by the statutes above recited. That reason is that the order of the circuit court requiring the justice to allow an appeal was conditioned upon the filing by the plaintiff of a good and sufficient appeal bond "to be approved by said justice." But, while there is in the bill of exceptions, without any recital showing how it got there, what purports to be a bond, bearing a *teste* two days earlier than the date of this order of the court, it nowhere appears from the justice's additional transcript, or otherwise from anything in the record, that this bond was ever approved by the justice, or even by the circuit court.

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These conclusions are strengthened by the fact that, when the defendant's motion to dismiss the appeal came on to be heard in the circuit court, the defendant offered testimony tending to show that the plaintiff had failed to take proper steps to perfect his appeal within the time prescribed by law; that he had tendered no affidavit or bond to the justice or to any person for the justice until more than twenty days after the rendition of the judgment; *and that no sufficient bond had ever been offered or approved for an appeal in said cause;* which evidence was excluded by the court. Here, then, was a case where the record not only failed to show that any appeal bond had ever been offered or approved by the justice in compliance with the order of the court, but where the defendant, on his motion to dismiss the appeal, offered to prove that such had never been done, but was not allowed to do so.

We must conclude from the foregoing that the record fails to show that an appeal was ever properly taken and perfected from the justice of the peace to the circuit court; that, consequently, the circuit court had no jurisdiction to proceed to a trial of the merits, and that we have no jurisdiction except to order that the judgment of the circuit court be reversed, and the cause remanded with directions to that court to strike the cause from its docket for want of jurisdiction. It is so ordered. All the judges concur.

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INDEX

BY DAVID GOLDSMITH.

ACCORD AND SATISFACTION.

1. Implication from silence.—An accord and satisfaction may be proved by the conduct of the parties as well as by their express agreement. But *held,* that the mere fact that the plaintiff received from the defendants less than the amount of his claim in silence, and with knowledge that the defendants claimed to be indebted to him only to the extent of the payment made, did not conclusively and as matter of law establish an accord and satisfaction. *Perkins v. Headley,* 556.

2. Acceptance of specific tender of less than claim in full satisfaction.—*Held,* further, however, in the course of discussion, that where a controversy as to the amount of the indebtedness exists between a creditor and his debtor, and the debtor tenders to the creditor the amount which he claims is due on condition that the acceptance of it should discharge the entire demand, the acceptance will constitute an accord and satisfaction as a matter of law, since one who accepts a conditional tender assents to the condition. *Ib.*

ADMINISTRATION.

1. Appeal by heirs—judgment for costs—writ of error.—Where heirs appeal from allowance against the estate in the probate court, if on a trial anew in the circuit court judgment is rendered against the estate, there can be no more adjudgment against the appellants for costs than there could be for the debt or damages mentioned in the appeal bond. The statute providing for such is complete in itself, and is not analogous to the statute allowing appeal from the justice's court; but, like the statute permitting appeals in forcible entry and detainer, no judgment can be rendered against the appellants therein in a summary manner, and such judgment may be reached by writ of error. *Harrington v. Evans,* 372.

2. Contract—effect of death of party—powers of legal representatives.—Whether a contract establishes a personal relation between the parties, or does more, so that it will survive the death of one of the parties, and can be executed by his legal representatives, depends upon the intention of the parties, unless the intention is such as the law will not enforce. And *held,* that the

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contract in question herein did not terminate with the death of one of the parties, since the continued execution of it, though involving the exercise of a certain amount of business judgment on the part of the legal representatives of the decedent, did not impose on such legal representatives any active duty in the management of the business provided for by it. *Lockart v. Forsythe, 654.*

3. Allowance of demands created after decease of the decedent—power coupled with interest.—A power coupled with an interest survives the death of the grantor of it; and when such power authorizes the grantee of it to contract debts and charge the grantor therewith—as was held to be the case herein—a debt contracted by the grantee in pursuance of it, though after the death of the grantor, may be presented and allowed as a demand against the estate of the latter. *Ib.*

4. Proof of notice of letters—evidence.—The statutory mode of proof of notice of letters of administration does not exclude other competent evidence of the fact, such as the testimony of the publisher supported by the files of his paper. *Dingle v. Pollick, 479.*

5. Demand against estate—allowance by judge in vacation. Claims against the estates of deceased persons must be presented to and allowed by the probate court while in session as such, and not to the judge in vacation. *Ib.*

6. ——— ——— entry of judgment after expiration of statutory limitation—antedating same.—For the probate judge in vacation and after expiration of the two years' limitation to enter judgment against an estate as of a prior date, so as to redeem it from the bar of the statute, is a wrong, and a legal fraud against the estate. *Ib.*

7. Action for cancellation of fraudulent entry of judgment—pleading.—In a petition seeking to set aside a judgment entered by the judge in vacation, etc., it is not necessary to allege in terms that the entry thus made was conceived in fraud, etc. It is sufficient to state the facts, and in this case the facts stated and proved constitute fraud in law. *Ib.*

8. ——— jurisdiction of equity—statute.—Fraud belongs to the original jurisdiction always exercised by a court of equity, and constitutes its most ancient foundation, and such jurisdiction is not ousted because a remedy exists at law; for the jurisdictional powers formerly possessed by that court still continue unaffected by the enlargements which are taking place in the functions of the courts of law, and will not be extinguished by anything short of direct and positive and prohibitory enactment; and section 213, Revised Statutes, 1889, providing for vacating improper allowances, etc., does not operate to oust a court of equity of its jurisdiction to set aside a judgment fraudulently procured and wrongfully entered. *Ib.*

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AGENCY. See PRINCIPAL AND AGENT.

AGISTMENT.

LIABILITY FOR VICIOUS ANIMAL.—Where an agister has knowledge of the vicious character of a horse in his pasture, he will be liable for injuries such horse may inflict on other animals taken for pasture. *Schroeder v. Faires, 470.*

AMENDMENT. See JUSTICES' COURTS, 2.

ANIMALS.

1. INCREASE OF.—The increase of the females of live stock belongs to the owner of the dam at the time. *Edmonston v. Wilson, 491.*

2. OFFSPRING OF DOMESTIC ANIMALS.—When the owner of domestic animals gives a mortgage during the period of gestation, the mortgagee will, against the mortgagor, be entitled to the offspring when born. *Ib.*

APPEALS.

1. ADMINISTRATION—APPEAL BY HEIRS—JUDGMENT FOR COSTS—WRIT OF ERROR.—Where heirs appeal from allowance against the estate in the probate court, if on a trial anew in the circuit court judgment is rendered against the estate, there can be no more adjudgment against the appellants for costs than there could be for the debt or damages mentioned in the appeal bond. The statute providing for such is complete in itself, and is not analogous to the statute allowing appeal from the justice's court; but, like the statute permitting appeals in forcible entry and detainer, no judgment can be rendered against the appellants therein in a summary manner, and such judgment may be reached by writ of error. *Harrington v. Evans, 372.*

2. ALIMONY—RIGHT OF APPEAL FROM ORDER OF REFUSAL.—An appeal lies from an order overruling a motion for alimony. *Adams v. Adams, 592.*

3. JURISDICTION OF APPEALS.—An action for the partition of land, in which the plaintiff's title, and, therefore, his right to a partition, is denied by one of the defendants, involves title to land, and the supreme court has jurisdiction of an appeal by such defendant from a decree of partition therein. *Hiles v. Rule, 628.*

4. ——— AMOUNT INVOLVED.—When the judgment in an action for $5,000 as damages (in this cause the action was for the death of a minor child) is only for $175, and the evidence does not show conclusively that the amount of the damages in any event must be within the jurisdiction of this court, the supreme court has jurisdiction of an appeal by the plaintiff. *Leahy v. Davis, 519.*

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5. **Appeal from Justices' Courts—Jurisdiction of Appellate Court.** A justice of the peace sent to the circuit court of his county a transcript of his docket in a cause, showing that final judgment had been rendered therein, but the record failed to show that any affidavit or bond for appeal was filed with the justice, or that any appeal was allowed by him, or that the allowance of the appeal was procured under Revised Statutes, 1889, section 6333, by proceedings in the circuit court. *Held*, that neither the circuit court, nor this court on appeal to it, acquired any jurisdiction to dispose of the cause on its merits, and that the cause should, therefore, have been stricken from the docket of the circuit court. *Devore v. Staeckler, 547.*

6. ———. The jurisdiction of the circuit court in cases appealed to it from justices of the peace is acquired in a special and statutory manner, and it is necessary in every such case that it should appear somewhere from the record that an appeal was granted in compliance with law. *Kelm v. Hunkler, 664.*

7. Jurisdiction of appeals.—In every case of appeal it is essential to the jurisdiction of the appellate court that the appeal be taken in the manner prescribed by law; otherwise the appellate court has no jurisdiction to examine the merits. *Whitehead v. Cole & Rodgers, 428.*

8. Appeals from justices' courts—affidavit—jurisdiction.—Section 6330, Revised Statutes, 1889, requires the affidavit of appeal from a justice's court to state whether the appeal is from the merits or from an order or judgment taxing costs, and, unless it so states, it is insufficient to confer jurisdiction on the circuit court. *Ib.*

9. ——— rule on justice to allow appeal.—A rule on a justice of the peace to allow an appeal from a judgment rendered by him is not authorized by section 6333 of the Revised Statutes of 1889, when it does not appear that the party moving for the rule tendered or was ready to perfect the bond for the appeal within the prescribed time; the mere fact that such party called at the justice's office within that time with an intention to appeal, but failed to meet the justice, will not suffice. *Kelm v. Hunkler, 664.*

10. ——— notice of appeal.—Service of notice of appeal on the attorney who appeared for the appellee at the trial before the justice is sufficient. *Byrd v. Steele, 419.*

ASSISTANT PROSECUTING ATTORNEY. See St. Louis, 1, 2.

ATTACHMENT.

1. Fraudulent conveyances—mortgage of stock of goods.—The mortgage of a stock of goods, where the mortgagor continues with the consent of the mortgagee in his usual course of business, selling the same, is fraudulent in law, and furnishes ground for attachment; nor does it matter if it was made to secure a *bona fide* debt. *Sauer v. Behr, 86.*

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2. ——— IMMATERIALITY OF PARTICIPATION OF MORTGAGEE.—On the trial of the plea in abatement to an attachment, the participation or non-participation of the mortgagee in the alleged fraudulent mortgage is immaterial, as the matter in issue is the fraud or good faith of the attached debtor in the transaction. *Ib.*

3. GROUNDS FOR—FRAUDULENT CONTRACTION OF DEBT.—If a debtor contracts a debt with the preconceived intention not to pay it, the debt is fraudulently contracted within the meaning of the statute defining the grounds for attachment, and the creditor is accordingly entitled to a writ of attachment in aid of his suit thereon. *Blackwell v. Fry, 638.*

4. ——— CIRCUMSTANTIAL EVIDENCE.—The existence of an intention on the part of the debtor never to pay the debt may be established by circumstantial evidence. *Ib.*

5. GARNISHMENT ON ATTACHMENT—EFFECT OF REVERSAL OF ATTACHMENT JUDGMENT.—Where the judgment sustaining the attachment is reversed, a judgment against a garnishee of the attachment defendant in a contest with an assignee of such defendant should also be reversed. *Smith v. Railroad, 54.*

6. RIGHTS AND PRIORITIES OF ATTACHING CREDITORS.—The rights and priorities of attachment creditors, as between themselves, are matters of strict law. If the first attacher once loses his lien, the rights of the junior attachers intervene and take precedence. The execution lien must be traced through the usual course of judicial procedure to the original levy under the writ of attachment. *Burnham, Hanna, Munger & Co. v. Blank, 56.*

7. ——— CONFESSION OF JUDGMENT.—S. sued out his writ of attachment in due form against M. Subsequently B. likewise duly brought attachment against M. Before the return term of these writs, S. secured from M. a confession of judgment in statutory form, on which the court entered judgment by confession, reciting therein that it was upon a statement in writing for confession of judgment, but without any reference to the attachment suit or property. *Held,* the execution on S.'s judgment should be postponed to the execution on B.'s judgment, which was obtained in the usual course. *Ib.*

8. ASSIGNABILITY OF ATTACHMENT BONDS.—Attachment bonds and claims arising under them are assignable. *State to use v. Heckart, 280.*

9. FOR RULING as to the liability of constables for penal interest, see Constable, 1.

ATTORNEY AND CLIENT.

COLLECTION BY ATTORNEY—LIMITATION OF ACTION BY CLIENT.—The statute of limitations begins to run in favor of an attorney on a claim for money collected by him for his client, when the client acquires knowledge of the collection. *Donahue v. Bragg, 273.*

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BAILMENT. See BARTER.

BARTER.

1. SALES—EXCHANGE.—Plaintiff deposited with the defendant mill company wheat with the understanding that on demand he should be entitled to so many pounds of flour per bushel. *Held*, not a bailment nor a sale, but an exchange. *Martin v. Ashland Mill Co.*, 23.

2. ——— ———. An exchange is a reciprocal contract for the interchange of property, each party being a vendor and a vendee as in sales; the title is absolutely transferred, and the same rules are applicable as in sales. *Ib.*

BILLS AND NOTES. See PROMISSORY NOTES.

BILL OF EXCEPTIONS. See PRACTICE, APPELLATE, 5–7.

BONDS.

ASSIGNMENT OF ATTACHMENT BONDS.—Attachment bonds and claims arising under them are assignable. *State to use v. Heckart*, 280.

BROKER. See PRINCIPAL AND AGENT, 3.

BURDEN OF PROOF. See CRIMINAL LAW, 16; FRAUD AND FRAUDULENT CONVEYANCES, 6; REPLEVIN, 4.

1. SHIFTING OF BURDEN OF PROOF—DISTINGUISHED FROM SHIFTING OF WEIGHT OF EVIDENCE. *Held*, in the course of discussion, that the burden of proof never shifts during the trial so long as the evidence is directed to the same proposition of fact, and that a distinction is to be drawn in this respect between the shifting of the burden of proof, and the shifting of the weight or preponderance of the evidence. *Bunker v. Hibler*, 536.

2. ACCOUNTING BY GARNISHEE AS AGENT OF THE PRINCIPAL DEFENDANT.—*Held*, accordingly, that when the garnishee admitted, in his answer a liability in a stated sum to the principal defendant, and the plaintiff, by his denial, alleged that the liability was greater, the burden of proving the truth of the latter allegation was on the plaintiff, though it appeared in evidence that the garnishee had, prior to the service of garnishment, received a greater sum as the agent of the principal defendant. *Ib.*

CHATTEL MORTGAGE.

1. GARNISHMENT—MORTGAGOR AND MORTGAGEE.—A mortgagor agreed with the mortgagee that the latter should retain the surplus proceeds of the mortgage sale, and apply the same in payment of certain subsequent advances made by the mortgagee to the mortgagor. After the sale, which produced a surplus, the mortgagee was garnished by an attaching creditor of the mortgagor. *Held*, the agreement, though not in writing nor acknowledged and recorded, was valid, and the garnishment should fail, as the agreement was a pledge consummated by possession. *Jewell Pure Water Co. v. Harkness & Russell*, 357.

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2. **Growing crop.**—A chattel mortgage given after seed sown had sprouted and made its appearance above ground as a growing crop covers the grain when it comes into existence. *Edmonston v. Wilson, 491.*

3. **Offspring of domestic animals.**—When the owner of domestic animals gives a mortgage during the period of gestation, the mortgagee will against the mortgagor be entitled to the offspring when born. *Ib.*

4. ——— **description—registration.**—The registration of a chattel mortgage is equivalent to a transmutation of possession; and the mortgage described the animal as one bay mare in foal, etc., and was duly recorded: the purchaser of the mare's colt when between five and six months old, and still following its dam, will be presumed to know that the mortgage was given during the pregnancy of its dam, and that it, too, was subject to the lien of that instrument. *Ib.*

5. **For ruling** as to the effect of the withholding of a chattel mortgage from record, and of the reservation of a power of sale by the mortgagor, see Fraud and Fraudulent Conveyances, 3, 4.

CONSTABLE.

1. Allowance of penal interest for wrongful release of levy. Penal interest is not allowable under sections 3029 and 3032 of the Revised Statutes of 1879 for the wrongful release by a constable of property levied upon by him. Whether it is allowable for such release under the amendment of section 3029 in the revision of 1889 (R. S. 1889, sec. 6317) is not determined. *State ex rel. v. Chaney, 511.*

2. Powers of constable out of his township.—A deputy constable has powers and duties over his entire county, and his being out of his township will not deprive him of his right to show his official character as defense in a prosecution for carrying concealed weapons. *State v. Pollock, 445.*

CONTRACT. See Custom, 1, 2; Vendor and Vendee, 2.

1. Usage—particular business—knowledge.—A person entering into a contract is not bound by the usage of a particular business, unless it be so general as to furnish a presumption of knowledge, or it is proved he was acquainted with it. *Martin v. Ashland Mill Co., 23.*

2. Implied promise.—A promise cannot be implied contrary to the expressed intention of the party sought to be charged. *Mansur v. Murphy, 266.*

3. For rulings in regard to the letting of contracts for public work see Municipal Corporations, 3, 4.

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4. Stallions—construction and effect of contract for services. The statute in regard to the publication of the terms for the service of a stallion (R. S. 1889, sec. 6732) does not invalidate a contract fixing the amount of the charges for such services; it applies only in the absence of a special agreement in relation to the amount of such charges. A contract of that character is construed in this cause. *Sturgeon v. Merritt, 160.*

5. Effect of death of party—powers of legal representatives. Whether a contract establishes a personal relation between the parties, or does more, so that it will survive the death of one of the parties, and can be executed by his legal representatives, depends upon the intention of the parties, unless the intention is such as the law will not enforce. And *held*, that the contract in question herein did not terminate with the death of one of the parties, since the continued execution of it, though involving the exercise of a certain amount of business judgment on the part of the legal representatives of the decedent, did not impose on such legal representatives any active duty in the management of the business provided for by it. *Lockart v. Forsythe, 654.*

6. Recovery of money paid on void contract.—The contract of the husband and wife to sell the real estate of the latter held by the general title is worthless, and binds neither party thereto, and is no consideration for money paid thereon, nor for the obligation of forfeiture therein, and said money so paid can be recovered, and no stipulation of such contract can defeat such recovery. *Gwin v. Smur, 361.*

7. Contract of subscription—right of action.—If the subscribers to a subscription list thereby agree with a person named to pay him their respective subscriptions upon the erection of a certain building by him, he can, upon the execution of the agreement on his part, enforce the payment of the subscription by suit. Nor will the nonperformance of an agreement, made by the subscribers among themselves, and not by the person contracted with, constitute any defense to such a suit. *Davis v. Johnson, 240.*

8. Severable contracts—former recovery.—Where the payments under a contract are to be made in installments, and the party bound to make them refuses altogether to carry out the contract after some of the installments have been earned, the party entitled to payment may at once sue for and recover these installments, and, after the expiration of the period contracted for, sue for his remaining damages, that is, his loss of earnings after such refusal. And *held* that this rule should prevail in this cause, though the suit for the installments earned was instituted after the time appointed by the contract for the payment of a later unearned installment. *West v. Moser, 201.*

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9. **Breach of contract—measure of damages.**—The defendant in this cause wrongfully refused to execute his contract with the plaintiff. *Held,* that the plaintiff was entitled to recover damages for the non-performance of what the contract required the defendant to do, but not for more. *Ib.*

CORPORATIONS.

1. Chartered in one state to do business in another—comity. A charter to conduct an exposition at St. Joseph, Missouri, was obtained from the state of Colorado, with a capital of $1,000,000, when in fact there was only $43,000 stock subscribed. The laws of Missouri require that before such charter shall issue all the stock shall be *bona fide* subscribed, and one-half thereof fully paid up. The whole business of said corporation was to be conducted at St. Joseph, Missouri, where its principal office was, though there was provision for the establishment of branch offices at Denver, Colorado, and other places. *Held,* the rule of comity does not protect such corporation which was a fraud upon the laws of both states, and only colorable, and absolutely void, and the incorporators were partners, and liable as such for the debts of the alleged corporation. *Cleaton v. Emery, 345.*

2. Estoppel—validity of corporation—creditors.—While one having secured some advantage from an alleged corporation cannot, on an attempt to enforce payment, deny the existence of the corporation, yet the corporate creditor seeking to enforce payment of his debt may ignore the existence of the corporation and proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with. *Ib.*

3. Powers of corporate agents.—When the president and managing officer of a corporation assigns a chose in action belonging to the corporation in payment of a corporate debt, his authority to make the assignment may be sustained by proof that the corporation held him out as possessing it, as where the corporation tacitly permitted a practice on his part to exercise the power to transfer corporate assets for such purposes without obtaining special authority from the board of directors. *State to use v. Heckart, 280.*

4. Creditors' bill to subject assets of insolvent corporation—adjudicated demand—trust fund.—Where a creditor seeks to set aside a fraudulent conveyance of his debtor, he must come into a court of equity with an adjudicated demand, but a bill may be maintained to have a court of equity take charge of the assets of an insolvent and dissolved corporation and distribute it ratably among its creditors without the creditors putting their claim in judgment, such assets being a trust fund for the benefit of all the creditors alike. *White v. University Land Co., 450.*

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5. ——— DISTRIBUTION.—A trust fund like the assets of an insolvent corporation, after payment of the legitimate costs and expenses, should be distributed among the creditors *pro rata*. *Ib.*

6. ——— EXPENSES OF PRESERVING TRUST FUND.—Where the original plaintiffs have borne all, or the major portion, of the expense incurred in employing counsel and preparing the cause for trial, it would seem just and equitable that such extra expenses be first paid before any distribution is ordered. *Ib.*

COSTS. See APPEALS, 1.

CREDITORS' BILL.

FOR RULINGS in a proceeding for the ratable distribution of the assets of an insolvent corporation, see Corporation, 4–6.

CRIMINAL LAW. See ST. LOUIS, 1, 2.

1. PRACTICE, APPELLATE—PAYMENT OF DOCKET FEE IN CRIMINAL CASE. A defendant in a criminal case, who appeals to this court, must pay the docket fee; in case of his failure to do so his appeal may be dismissed. *State v. Caughron, 311.*

2. ARRAIGNMENT OF DEFENDANT.—In misdemeanors there should be an arraignment; but, if made and entered in the justice's court, there need be none in the circuit court. *State v. Haycroft, 488.*

3. NON-DIRECTION OF JURY IN PROSECUTION FOR MISDEMEANORS. Under section 4208 of the Revised Statutes, 1889, the mere non-direction of the jury does not constitute error in a prosecution for a misdemeanor. *State v. Matheis, 237.*

4. PROSECUTION FOR MISDEMEANOR—INSTRUCTING JURY IN ABSENCE OF DEFENDANT AND HIS COUNSEL.—It is error for the trial court in a criminal cause, after the argument of the cause and in the absence of the defendant and his counsel, to give to the jury an additional instruction, though this is done in open court; and a judgment convicting the defendant must be reversed therefor, unless it clearly appears that such additional instruction wrought no prejudice to him. And *held*, that a reversal should result therefrom in this cause, though the additional instruction could properly have been given in the first instance. *State v. Meagher, 571.*

5. INFORMATION AND INDICTMENT—INFORMATIONS RUNNING IN NAME OF STATE.—An information is not invalid, because it runs in the name of the state and of the county in which it is filed. The name of the county will in such case be rejected as surplusage. *State v. Murphy, 270.*

6. ——— CHARGING THE OFFENSE.—It will be sufficient for an information, in charging the offense, to follow the language of the statute in all cases wherein the statute individuates the offense. This rule is applied to an information charging a violation of section 3502 of the Revised Statutes, to-wit, the exhibition of a deadly weapon in a rude, angry and threatening manner, in the presence of one or more persons. *Ib.*

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7. ——— SALE OF INTOXICATING LIQUORS BY LICENSED DRAMSHOP KEEPER ON SUNDAY.—An indictment for the sale of intoxicating liquors by a licensed dramshop keeper at his dramshop on a Sunday is good, if it follows the language of the statute in charging the offense. *State v. Meagher, 571.*

8. ——— SALE OF LIQUOR BY DRUGGIST.—An indictment against a druggist, under section 4621 of the Revised Statutes of 1889, for selling liquor without the prescription of a duly registered physician is fatally defective even after verdict, if it fails to state the name of the person to whom the liquor was sold. *State v. Cassity, 300, 302; State v. Quinn, 602.*

9. PLEADING—PLEADING IN PROSECUTION FOR MISDEMEANOR.—When a defendant, after pleading not guilty to an indictment for a misdemeanor, by leave of court demurs to the indictment, the demurrer has not the effect of withdrawing the plea, and, therefore, the defendant need not enter a new plea after the demurrer is overruled. *State v. Meagher, 571.*

10. ——— TWO COUNTS—GENERAL VERDICT.—In the justice's court the information contained two counts, and there was a general verdict of guilty. On appeal in the circuit court there was a trial on the first count only, and a verdict of guilty. It was contended that, since the verdict in the justice's court was silent as to which count the finding was on, it amounted to an acquittal on one count, and as the counts were for the same offense it amounted to an acquittal on both. *Held*, the contention was not allowable. *State v. Haycroft, 488.*

11. CARRYING CONCEALED WEAPONS—EVIDENCE—OFFICER.—In defense of a prosecution for carrying concealed weapons in a courthouse during the sitting of court, the defendant may show he had the weapon for the purpose of producing it on the trial of a suit then pending; and also that he was a deputy constable authorized to execute process, warrants, etc. *State v. Pollock, 445.*

12. ——— CONSTABLE OUT OF HIS TOWNSHIP.—A deputy constable has powers and duties over his entire county, and his being out of his township will not deprive him of his right to show his official character as defense in a prosecution for carrying concealed weapons. *Ib.*

13. OPEN AND GROSS LEWDNESS—SUFFICIENCY OF THE EVIDENCE.—The evidence in this cause is considered ,and *held* insufficient to support a conviction for the crime charged, which was open and gross lewdness. *State v. Phillips, 325.*

14. SELLING LIQUOR TO MINOR—ORDER—PRINCIPAL.—A sale of intoxicating liquor to a minor under an order disclosing his principal is a sale to the principal, and not to the minor; but a sale to a minor without an order disclosing his principal is a sale to the minor,

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even though the liquor be, in fact, for the principal; nor would the minor's statement at the time of the sale, that he was purchasing for another, take the sale out of the statute. *State v. McLain, 398.*

15. ——— EVIDENCE—OTHER OFFENSE.—In the prosecution for selling liquor to a minor, the testimony should be confined to the sale to the minor named in the indictment, and when there is no evidence of such sale there can be no conviction. *State v. Yockey, 443.*

16. UNLAWFUL SALE OF INTOXICATING LIQUORS—BURDEN OF PROOF.—In order to convict a defendant for the unlawful selling of intoxicating liquors, when the sale is not made by him in person, but by some one else on the defendant's premises, the state must show that the person making the sale was the agent or employe of the defendant. But, when it appears that the liquor was sold by a person employed by the defendant to sell liquor for him at the particular place, and that the sale took place in violation of the statute, then a *prima facie* case is made out against the defendant, which he must rebut by showing that, in making the sale, his agent acted either without authority or contrary to his orders. *State v. Meagher, 571.*

17. KEEPING LICENSED DRAMSHOP OPEN ON SUNDAY—SUFFICIENCY OF THE EVIDENCE.—The evidence in this cause is considered, and *held* sufficient to warrant the conviction of the defendant, a licensed dramshop keeper, for keeping his dramshop open and selling intoxicating liquors therein on a Sunday, though he was not present in person. *Ib.*

18. ——— PURPOSE OF DEFENDANT.—It is immaterial for what purpose the defendant in such a cause goes to his dramshop, if he opens the place so that customers can come in, and sells intoxicating liquors there after they have come in on a Sunday. *Ib.*

CUSTOM.

1. CONSTRUCTION OF USAGE.—Customs and usages must be construed strictly, even more so than any act of parliament that alters the common law. *Martin v. Ashland Mill Co., 23.*

2. VALIDITY OF CUSTOM.—A custom cannot be permitted to vary a general and well-settled rule of law; nor will parties be held to enter into contract with reference to an unreasonable custom that leads to absurd consequences, especially when unknown. *Ib.*

3. PARTICULAR BUSINESS—KNOWLEDGE.—A person entering into a contract is not bound by the usage of a particular business, unless it be so general as to furnish a presumption of knowledge, or it is proved he was acquainted with it. *Ib.*

DAMAGES. See PLEADING, 8.

1. BREACH OF CONTRACT—MEASURE OF DAMAGES.—The defendant in this cause wrongfully refused to execute his contract with the plaintiff. *Held*, that the plaintiff was entitled to recover damages for the non-performance of what the contract required the defendant to do, but not for more. *West v. Moser, 201.*

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2. **INJURY TO MINOR—DIMINISHED EARNING CAPACITY AFTER MAJORITY—PLEADING.—When the plaintiff in such an action is a minor, he need not specially plead as damages that his earning capacity after he will have attained his majority will be diminished; moreover, a general allegation of permanent disability to labor by reason of the injuries complained of embraces a claim for such damages.** ***Bartley v. Trorlicht, 214.***

3. ——— **EVIDENCE.—Such damages may be allowed in favor of a minor, though there is no direct evidence of them, their amount being referred to the judgment of the jury as a matter of common experience.** ***Ib.***

4. ACTION FOR WRONGFUL OBSTRUCTION OF WATERCOURSE—MEASURE OF DAMAGES.—The damages recoverable by the tenant in such an action consist of the injury done to the crop sued for. Where a tenant is not prevented by such an overflow from cultivating the land held by him, he is not entitled to the depreciation in the rental value of the land in consequence of such obstruction. *McKee v. Railroad, 174.*

5. SALES—FAILURE TO DELIVER—MARKET PRICE.—In case of a failure to deliver according to contract of sale, the ordinary measure of damages is the difference between the contract price and the market price of the goods at the time and place of delivery; but where there is no market price at the place of delivery, the market price at the place to which they were to be sent, less the cost of transportation is the measure of their value at the place of delivery. *Vanstone v. Hopkins, 386.*

6. TELEGRAMS—DAMAGES FOR DELAYED DELIVERY—LIMIT OF PRESENTATION OF CLAIM FOR.—Agreements limiting the time for presenting claims for damages for the delayed delivery of a telegram are universally upheld, where the time limited is reasonable, and sixty days from date of sending is a reasonable time; and the evidence in this case is *held* to show that plaintiff did, within the sixty days limited, learn of the delayed delivery and consequent damages, or could have done so by the use of ordinary diligence. *Smith-Frazier Boot & Shoe Co. v. Western Union Tel. Co., 99.*

7. INSTRUCTIONS.—An instruction in such an action, which directs the jury to assess the plaintiff's damages at such sum as they may believe he is entitled to under the evidence, is erroneous. *McKee v. Railroad, 174.*

8. EVIDENCE OF SPECIAL DAMAGES WHICH HAVE NOT BEEN PLEADED—WAIVER OF OBJECTION.—*Held*, in the course of discussion, that if evidence of special damages is admitted without objection, the right of objection on the ground that the damages were not specially pleaded is lost. *Bartley v. Trorlicht, 214.*

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9. SUFFICIENCY OF EVIDENCE AS TO DAMAGES.—The evidence is considered, and is *held* to have been sufficiently definite in regard to the *quantum* of the damages to warrant the verdict for the plaintiff. *Pinnell v. Railroad, 170.*

DEFINITIONS.

FOR THE DEFINITION of "adjacent," see Taxes, Special, 11; of an exchange, see Barter, 2; of "negotiated," see Promissory Notes, 1; of a sale, see Sales, 1.

DIVORCE.

1. ALIMONY—RIGHT OF APPEAL FROM ORDER OF REFUSAL.—An appeal lies from an order overruling a motion for alimony. *Adams v. Adams, 592.*

2. RIGHT OF COURT TO GRANT ALIMONY AFTER JUDGMENT.—Alimony to defray counsel fees may be allowed after final judgment in the cause, when the motion therefor is filed prior to the trial, but as a matter of convenience is heard with the issues in the cause. *Ib.*

3. ALIMONY TO DEFRAY COUNSEL FEES—PRACTICE, APPELLATE—PRESUMPTIONS IN FAVOR OF JUDGMENT OF TRIAL COURT.—The allowance of such alimony is not a matter of right under all circumstances, but facts may appear at the hearing of the application therefor which will justify the refusal of it. Accordingly, an order refusing it cannot be reviewed, when it does not appear what evidence was developed as to the merits of the application at the hearing thereof; since, in such case, it cannot be said that the trial court abused its discretion in the premises. *Ib.*

4. PLEADING.—In a petition for divorce it is not necessary to allege that plaintiff is a resident of the county in which the action was begun. (*Denying Pate v. Pate*, 6 Mo. App. 49). *Gant v. Gant, 8.*

DRAMSHOPS. See CRIMINAL LAW, 7, 16, 17, 18.

1. LOCAL OPTION—ELECTION WITHIN FORTY DAYS.—An election for the enforcement of the local-option law must be held within forty days of the presentation of the petition to the county court, and if held after that time it is void. *State v. Webb, 407.*

2. ——— WITHDRAWAL AND RE-PRESENTATION OF PETITION.—A petition for the enforcement of the local-option law was presented on July 10, and an order made for an election in the county excluding two towns, supposed to have twenty-five hundred inhabitants each. On August 1, a part of the petitioners moved the court to set aside the order for the election, which was done; and thereupon they withdrew the petition and at once again presented it, and an election was ordered for August 31, in the county and one of the towns excluded in the prior order. *Held*, an idle performance; that there was only one petition presented, and that was on July 10, which then served its purpose, and from that time on was powerless to institute another such proceeding. *Ib.*

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8. ——— ELECTION THROUGHOUT COUNTY—NO OMITTED PRECINCT. Under the local-option statute the election must be held in every portion of the county over which the law is intended to operate, and, if any precinct entitled to vote is omitted, the entire election is void. *Semble*, it would appear that the order of election should show that an omitted precinct is not entitled to vote. *Ib.*

DRUGGISTS. See CRIMINAL LAW, 8.

EQUITY.

1. JURISDICTION OF EQUITY—FRAUD—STATUTE.—Fraud belongs to the original jurisdiction always exercised by a court of equity, and constitutes its most ancient foundation, and such jurisdiction is not ousted because a remedy exists at law; for the jurisdictional powers formerly possessed by that court still continue unaffected by the enlargements which are taking place in the functions of the courts of law, and will not be extinguished by anything short of direct and positive and prohibitory enactment; and section 213, Revised Statutes, 1889, providing for vacating improper allowances, etc., does not operate to oust a court of equity of its jurisdiction to set aside a judgment fraudulently procured and wrongfully entered. *Dingle v. Pollick*, 479.

2. REFORMATION OF CONTRACT—MISTAKE OF ONE PARTY ONLY.—To entitle a party to the reformation of a contract for mistake, the mistake must be mutual; mistake on the part of the complainant alone will not suffice. And *held*, further, in the course of discussion, that the mistake must be established by evidence which will strike the mind of the chancellor as free from reasonable doubt. *Steinberg v. Ins. Co.*, 255.

3. ——— LACHES.—It is the duty of the insured to examine a policy insuring him against loss by fire, and see whether it contains the contract bargained for, and the retention of the policy without complaint until after loss, and for an unreasonable time—over four months in this case—debars the right of reformation. *Ib.*

4. FOR RULINGS in a proceeding for the ratable distribution of the assets of an insolvent corporation, see Corporation, 4–6.

ESTOPPEL.

1. ESTOPPEL IN PAIS—SUFFICIENCY OF EVIDENCE.—The evidence in this cause is considered and *held* insufficient to establish an estoppel *in pais*. *Baker v. McInturff*, 505.

2. MORTGAGES—ESTOPPEL OF MORTGAGEE.—SMITH, P. J., *concurring*: Where a mortgagee, after his assignment of the note, takes a quitclaim deed to the mortgaged premises in satisfaction of the note, he is estopped as against his assignee to deny the mortgage lien on the premises, and so are his grantees. GILL, J., *dissenting*,

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holds that such transaction bars the foreclosure of the mortgage, the debt and the mortgage being for this purpose inseparable, and when the note is paid the mortgage expires. *Bartlett v. Eddy*, 32.

EVIDENCE. See BURDEN OF PROOF AND WITNESSES.

1. JUDICIAL NOTICE—POWERS OF CITY TO RESTRAIN RUNNING AT LARGE OF ANIMALS.—Courts will take judicial notice of the power of a city by ordinance to restrain the running of hogs at large within the corporate limits of the city, outside of the owner's inclosure. *Sherrell v. Murray*, 233.

2. RES ADJUDICATA—ADMISSIBILITY OF PAROL EVIDENCE.—Under a plea of *res adjudicata* parol evidence is not admissible to contradict a judicial record; but, where the record does not distinctly show what was adjudicated in the prior action, this may be proved by parol. *West v. Moser*, 201.

3. ——— ——— PROOF OF NONSUIT AS TO ONE OF SEVERAL COUNTS. In this cause the issue was whether a judgment in a prior action between the same parties, in which the petition contained two counts, determined the rights of the parties under both counts or only under one of them, and it was *held* competent for the plaintiff to establish by oral testimony that he had taken a nonsuit as to one of these counts, though the record of the cause did not recite that fact. *Ib.*

4. ADMINISTRATION—PROOF OF NOTICE OF LETTERS—EVIDENCE.—The statutory mode of proof of notice of letters of administration does not exclude other competent evidence of the fact such as the testimony of the publisher supported by the files of his paper. *Dingle v. Pollick*, 479.

5. CLERK'S INDORSEMENT OF FILE MARK ON PAPERS.—The indorsement, made by the clerk on a bill of exceptions, of the fact, and date of the filing of the paper, is competent evidence of those matters. *Steinberg v. Ins. Co.*, 255.

6. ADMISSION OF EVIDENCE NOT COVERED BY PLEADINGS—SUFFICIENCY OF OBJECTION.—*Semble*, that an objection to the admissibility of evidence on the ground of the irrelevancy of the evidence covers the ground that the evidence is not admissible under the pleadings. *Baker v. McInturff*, 505.

EXCHANGE. See BARTER, 1, 2.

EXECUTION.

FOR RULING as to the liability of a constable for penal interest, see CONSTABLES, 1.

FIXTURES. See MECHANICS' LIENS, 1, 2.

1. ERECTION ON REALTY WITH LICENSE.—When one places an erection upon the land of another with his permission, with the intention that it is to be held as the property of the builder, it continues personal property, and the owner may remove it when the license is withdrawn. *The Tudor Iron Works v. Hitt*, 472.

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2. COMMON LAW—AGREEMENT.—The rules of the common law relating to buildings and structures erected by the lessee are liable to be modified by the agreement of the parties on the subject, and so far as such agreement extends the question is no longer what is the common law, but what have the parties agreed. *Ib.*

3. TIES AND IRON RAILS.—Ties and iron rails laid down on a roadbed and fastened so that cars can pass over them become annexed to the realty, and are not personal property unless made so under an expressed or implied agreement for that purpose. *Ib.*

4. ——— SEVERANCE—REPLEVIN.—If such ties and rails by any means become severed from the realty, they become the personal property of the land-owner, and are the proper subject of replevin. *Ib.*

FORCIBLE ENTRY AND DETAINER.

UNLAWFUL DETAINER—LESSEE V. LESSOR—STATUTE.—A lessee never in possession, and to whom lessor refuses possession, could not, at common law, maintain unlawful detainer against the lessor, nor can he, under sections 5120 and 5121, Revised Statutes, 1889. (*Sexton v. Hull,* 45 Mo. App. 339, *distinguished.*) *Long v. Noe, 19.*

FORMER RECOVERY. See RES ADJUDICATA, 1, 2.

FRAUD AND FRAUDULENT CONVEYANCES.

1. ADMINISTRATION—ALLOWANCE OF DEMAND BY JUDGE IN VACATION—ENTRY OF JUDGMENT AFTER LIMITATION—ANTEDATING SAME.—For the probate judge in vacation and after expiration of the two years' limitation to enter judgment against an estate as of a prior date, so as to redeem it from the bar of the statute, is a wrong, and a legal fraud against the estate. *Dingle v. Pollick, 479.*

2. PURCHASE WITH INTENTION NEVER TO PAY—CIRCUMSTANTIAL EVIDENCE.—The existence of an intention on the part of the debtor never to pay the debt may be established by circumstantial evidence. *Blackwell v. Fry, 638.*

3. NON-REGISTRY OF CHATTEL MORTGAGE.—The withholding of a chattel mortgage on stock of goods from record, so as to place the credit and solvency of the mortgagor on a false basis and aid him in imposing on his creditors, is fraudulent. *Sauer v. Behr, 86.*

4. MORTGAGE OF STOCK OF GOODS WITH RESERVATION OF POWER OF SALE—ATTACHMENT.—The mortgage of a stock of goods where the mortgagor continues with the consent of the mortgagee in his usual course of business, selling the same, is fraudulent in law and furnishes ground for attachment, nor does it matter if it was made to secure a *bona fide* debt. *Ib.*

5. BONA FIDE PURCHASER FOR VALUE—NOTICE OF EQUITIES.—The fact, that the vendee of property has given his negotiable promissory notes to the vendor for the purchase price, will not constitute him a *bona fide* purchaser for value so as to cut off the equities of a third

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person, if it appears that the vendee was notified of those equities while the notes were in the hands of the vendor. And *held*, in the course of discussion, that in such case the vendee can enjoin the negotiation of the notes, and if, in consequence of his failure to take steps in that direction, the notes are transferred to an innocent purchaser, the vendee must suffer the loss. *Greenlee v. Marquis, 290.*

6. EQUITY—SETTING ASIDE RELEASE—EVIDENCE.—One seeking to set aside a release of damages for personal injuries, on the ground that his signature was fraudulently obtained,—the transaction being intended as a loan, and not a release,—has the burden of proof cast upon him; and the evidence in this case is reviewed and *held* to show that after plaintiff's injuries he went to the railway officials, and, with full knowledge, secured the compromise, and gave the release without any fraud or deception practiced upon him. *Thomas v. Railroad, 110.*

7. FOR RULING in regard to pleadings in an action to vacate an allowance against the estate of a deceased person, and also in regard to the jurisdiction of courts of equity in actions to set aside fraudulent transactions, see Administration, 7, 8.

FRAUDS. See STATUTE OF FRAUDS.

VERBAL CONTRACT—SUFFICIENCY OF WRITTEN OFFER.—The statute of frauds will apply if there is no part performance of the verbal agreement sued on; and a written proposition signed by the plaintiff only, addressed to no one, and about the acceptance of which there is some doubt, is not sufficient to withdraw the transaction from under the operation of the statute. *Vanstone v. Hopkins, 386.*

FRAUDULENT CONVEYANCES. See FRAUD AND FRAUDULENT CONVEYANCES.

GARNISHMENT.

1. GARNISHMENT ON ATTACHMENT—EFFECT OF REVERSAL OF ATTACHMENT JUDGMENT.—Where the judgment sustaining the attachment is reversed, a judgment against a garnishee of the attachment defendant in a contest with an assignee of such defendant should also be reversed. *Smith v. Railroad, 54.*

2. EFFECT OF ANSWER OF GARNISHEE.—The answer of the garnishee to the interrogatories exhibited in the garnishment proceeding is conclusive in his favor, unless it is overthrown by evidence on the part of the plaintiff. *Bunker v. Hibler, 536.*

3. BURDEN OF PROOF—ACCOUNTING BY GARNISHEE AS AGENT OF THE PRINCIPAL DEFENDANT.—*Held*, accordingly, that when the garnishee admitted in his answer a liability in a stated sum to the principal defendant, and the plaintiff, by his denial, alleged that the liability was greater, the burden of proving the truth of the latter allegation

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was on the plaintiff, though it appeared in evidence that the garnishee had, prior to the service of garnishment, received a greater sum as the agent of the principal defendant. *Ib.*

4. EFFECT OF GARNISHMENT.—An attaching creditor can hold the garnishee only to the extent of the defendant's claim against the garnishee. *Jewell Pure Water Co. v. Harkness & Russell, 357.*

5. MORTGAGOR AND MORTGAGEE.—A mortgagor agreed with the mortgagee that the latter should retain the surplus proceeds of the mortgage sale and apply the same in payment of certain subsequent advances made by the mortgagee to the mortgagor. After the sale, which produced a surplus, the mortgagee was garnished by an attaching creditor of the mortgagor. *Held*, the agreement, though not in writing nor acknowledged and recorded, was valid, and the garnishment should fail, as the agreement was a pledge consummated by possession. *Ib.*

6. MORTGAGEE'S LIABILITY.—Any removal of the mortgagee's liability to the mortgagor, which is the result of a *bona fide* contract made before a garnishment, cannot be interfered with or changed by the garnishment. *Ib.*

HIGHWAYS. See MUNICIPAL CORPORATIONS, 7-9; TAXES, SPECIAL, 1-13.

1. TOWNS—ESTABLISHMENT OF STREETS—REPAIRS.—A highway situated within the corporate limits of a town and used by the public for travel becomes for all legal purposes a street, and, while it is thus used by the public, the duty of repairing it rests exclusively upon the town. It is not necessary that the adoption of the highway as a street of the town should be made by ordinance. *Walker v. Point Pleasant, 244.*

2. STREET GRADE—EVIDENCE.—Street grades must be fixed by ordinance, and where the ordinance and grade books referred to therein do not establish the grade to a reasonable certainty, then it would be void, and the natural surface would be taken as the true grade. *Clapton v. Taylor, 117.*

3. KANSAS CITY—GRADE OF HOLMES STREET—BELT LINE ORDINANCE A plane extending from the grade of Nineteenth street, seventy-seven feet above the city directrix, to the grade of Twentieth street as established by the Belt Line ordinance, eighty-seven feet above the city directrix, describes the grade of Holmes street between these two streets. *Pratt v. Street Ry. Co., 63.*

4. RULE TO DETERMINE GRADES BETWEEN STREETS.—As a matter of law the grade of an intersecting street between two adjacent parallel streets bounding the same block is a true plane between the elevations of the two parallel streets. *Ib.*

5. CHANGE OF GRADE - DAMAGE— ESTOPPEL.—The raising of the grade of a street so that the surface thereof shall be above the abutting property of the plaintiff, which had been improved with reference to the

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original grade, would entitle plaintiff to recover for any resulting damage to his property; but where the plaintiff, as in this case, besought the defendant to grade the entire street to the then established grade, defendants are not liable for the resulting damages. *Ib.*

6. MUNICIPAL CORPORATION—SECOND-CLASS CITIES—CHANGING STREET GRADES.—In cities of the second class the grade of streets can only be changed by ordinance passed by the council and approved by the mayor; and the city will not be liable for the filling of a street above the grade by persons assuming to act under its authority. *Gehling v. City of St. Joseph, 430.*

HUSBAND AND WIFE.

1. MARRIED WOMEN—SEPARATE PROPERTY—WEDDING PRESENTS—COMMON LAW—STATUTE.—At common law the husband would be the owner of the wedding presents, but the language and intention of the married woman's act makes them the wife's separate property under her sole control, and it is not merely the object of the statute to free such property from the debts of the husband, but to divest him of all interest therein. *Ilgenfritz v. Ilgenfritz, 127.*

2. ——— ——— INTENTION OF DONOR.—Wedding presents before the marriage are the wife's "at her marriage," those given her afterward come to her during coverture by gift. In either instance they are her statutory separate property without any such intention of the donor appearing, the statute itself designating the effect of the gift. *Ib.*

3. ——— WIFE'S REMEDY IN EQUITY.—The married woman's act does not authorize the wife to sue the husband at law; and the unity of husband and wife is not destroyed by these statutes. *Ib.*

4. ——— CHARGING SEPARATE ESTATE.—When a married woman makes a contract for herself and on her own credit, the law will presume that she intended to charge her separate estate. Nor does it matter that the person, with whom she has contracted, did not, at the time of the making of the contract, know of the existence of the property which he seeks to charge as such separate estate, nor that the married woman did not have in mind the charging of that particular piece of property. *Lee v. Cohick, 188.*

5. CONTRACTS—MONEY PAID ON VOID CONTRACT RECOVERED.—The contract of the husband and wife to sell the real estate of the latter held by the general title is worthless, and binds neither party thereto, and is no consideration for money paid thereon, nor for the obligation of forfeiture therein, and said money so paid can be recovered, and no stipulation of such contract can defeat such recovery. *Grin v. Smur, 361.*

INFANTS. See CRIMINAL LAW, 14, 15.

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INSTRUCTIONS.

1. Not supported by evidence.—An instruction not supported by any evidence in the cause is erroneous. *Sherrell v. Murray, 233.*

2. ———. An instruction should not assume a fact of which there is no evidence, and thereby insert a rule inapplicable to the facts which the evidence tended to prove. *Vanstone v. Hopkins, 386.*

3. Drawing conclusions of fact.—An instruction which directs the jury to draw a disputable conclusion of fact is properly refused. *Lamb v. Bush, 337.*

4. Omission of essential condition to right of action—effect of other instructions.—If an instruction given for the plaintiff, which undertakes to state the conditions upon which his right of action is predicated, omits an essential element to such right of action, the existence of which is in dispute, the error is not cured by another instruction given for the defendant, which mentions that element as one of the conditions precedent to the plaintiff's right of recovery. *Voegeli v. Pickel M. & G. Co., 643.*

5. Liability of master for tortious act of servant.—An instruction is erroneous, if it authorizes a recovery against the master for the tortious act of his servants without requiring any finding that the servants acted within the scope of their employment or by authority from the master, where this is controverted. *Ib.*

6. Damages.—An instruction which directs the jury to assess the plaintiff's damages at such sum as they may believe he is entitled to under the evidence, is erroneous. *McKee v. Railroad, 174.*

7. Contributory negligence on part of a child.—An instruction in this cause defined the care, which the plaintiff, who was a child, was bound to exercise, as such care "as boys of his age, experience and discretion usually exercise." *Held, per curiam,* that this instruction was faulty, in that it made the requisite care depend upon the discretion of this particular child instead of the discretion reasonably to be expected of a boy of his age, but that the error was not prejudicial so as to necessitate a reversal of the judgment in his favor. But *held* by Thompson, J., that the instruction was correct. *Bartley v. Trorlicht, 214.*

8. For ruling on the effect of the giving of an additional instruction in a criminal prosecution, after argument and in the absence of the defendant and his counsel, see Criminal Law, 4.

INSURANCE, FIRE.

1. Reformation of policy—laches.—It is the duty of the insured to examine a policy insuring him against loss by fire, and see whether it contains the contract bargained for; and the retention of the policy without complaint until after loss, and for an unreasonable time—over four months in this case—debars the right of reformation. *Steinberg v. Ins. Co., 255.*

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2. Occupancy—waiver—limitation of agent's authority.—Where an insurance policy provides that it shall become void, if, without permission in writing, the building becomes vacant, etc., and that no agent can waive, modify, erase or strike out any condition, stipulation or restriction, nor bind the company by any act or statement, the ceasing to use and occupy the premises in question in the manner as shown when the policy was taken out, without written permission indorsed on the policy, avoided it; and no act of the local agent can be used to modify or change the plain terms of the contract. *Sprague v. The Western Home Ins. Co., 423.*

3. Condition of policy as to change in title—sale of property in partition.—A policy of fire insurance contained the following provision: "This entire policy * * * shall be void * * * if any change, other than the death of the insured, takes place in the interest, title or possession of the subject of the insurance, * * * whether by legal process or judgment, or by voluntary act of the insured, or otherwise." The insured died, and devised one-third of his estate to his wife during her widowhood, and remainder to his children. Subsequently, the property insured, a dwelling, was set apart to the widow, during widowhood, under partition proceedings between the devisees. *Held*, that a change of title had been effected under these proceedings, which avoided the policy. *Trabue v. The Dwelling-House Ins. Co., 331.*

4. Insurance of different subjects by same policy—breach of condition as to one.—The policy in question insured said dwelling and the furniture therein in separate amounts. *Held (following Holloway v. Dwelling-House Ins. Co.*, 48 Mo. App. 1), that it was avoided as to both by said breach of condition as to the dwelling, since it expressly provided that the entire policy should be void in case of such breach. *Ib.*

5. Provision of policy for keeping books in safe—waiver.—An insurance policy required the insured to keep his invoices and inventories and books in an iron safe, or some secure place not exposed to a fire that would destroy the buildings where the business was carried on. At the time of making the application, the insurer's solicitor was informed the insured had no iron safe. *Held*, the insurance of the policy with such information did not constitute a waiver of the alternative of keeping the books in a secure place, and a failure to so keep them would defeat a recovery. *Crigler v. Ins. Co., 11.*

6. ——— condition precedent.—Where an insurance policy requires the insured to keep books showing a complete record of the business with invoices and inventories, such books and papers are the best evidence of the amount of the loss, and their production is a condition precedent to a recovery. *(Spratt v. Ins. Co.*, 13 S. W. Rep. 792, *distinguished.) Ib.*

7. **Printed slip—part of policy.**—A stipulation printed on a slip which is attached to a policy at the time of delivery will be taken as embraced in and constituting a part of the policy. *Ib.*

8. **Pleading—conditions precedent.**—A petition must allege the performance of a condition precedent to the right of recovery, or else sufficient excuse for the non-performance of the condition; otherwise, it will be bad on demurrer. *Beckman v. Ins. Co., 604.*

9. ——— **curing the absence of essential averments.**—But where the petition fails to make either such allegation, and the answer affirmatively pleads non-performance, and the plaintiff takes issue by reply, the defect in the petition will be helped out by the subsequent pleadings. *Ib.*

INTERPLEADER.

Pleading.—It will not be sufficient for a bill of interpleader to state that the defendants make conflicting claims to the same fund in the hands of the plaintiff stakeholder, and that the plaintiff does not know to which of them to pay the fund. The bill will be bad on demurrer, unless it states the nature of these conflicting claims sufficiently to show a color of right to the fund on the part of each claimant. *Robards v. Clayton, 608.*

JUDGMENT.

Attachment—confession of judgment.—S. sued out his writ of attachment in due form against M. Subsequently B. likewise duly brought attachment against M. Before the return term of these writs, S. secured from M. a confession of judgment in statutory form, on which the court entered judgment by confession, reciting therein that it was upon a statement in writing for confession of judgment, but without any reference to the attachment suit or property. *Held,* the execution of S.'s judgment should be postponed to the execution on B.'s judgment which was obtained in the usual course. *Burnham, Hanna, Munger & Co. v. Blank, 56.*

JURISDICTION, APPELLATE. See Appeals, 3–9.

JUSTICES' COURTS. See Mechanics' Liens, 6, 7.

1. **Jurisdiction of action against railway company for killing stock.**—In order to warrant a recovery in an action against a railroad company, instituted before a justice of the peace for the negligent killing of cattle, it must be shown that the cattle were killed in the township in which the action was commenced, or in an adjoining township. *Whitesides v. Railroad, 250.*

2. **Amendment of statement of cause of action.**—This cause was instituted before a justice of the peace upon an account in favor of the plaintiff and against the defendant, which consisted of the following item: "For work and labor, $129.32." *Held,* that the statement was not a complete nullity, but that it could be amended. *Lamb v. Bush, 337.*

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3. Denial of counterclaim.—In an action before a justice of the peace the plaintiff does not admit a counterclaim, filed by the defendant, by not pleading thereto. In such actions affirmative matter set up by either party is understood to be denied, though no formal denial is filed. *Ib.*

4. Mechanics' lien—service of process.—The finding by a justice that the defendant has absconded from his last usual place of abode, and cannot be found in this county, is not sufficient to authorize an order of publication, as it does not appear that defendant could not have been summoned by leaving a copy of the summons at his usual place of abode, etc. *Byrd v. Steele, 419.*

5. Constables—allowance of penal interest for wrongful release of levy.—Penal interest is not allowable under sections 3029 and 3032 of the Revised Statutes of 1879 for the wrongful release by a constable of property levied upon by him. Whether it is allowable for such release under the amendment of section 3029 in the revision of 1889 (R. S. 1889, sec. 6317) is not determined. *State ex rel. v Chaney, 511.*

6. For rulings in reference to appeals from justices' courts, see Appeals, 5–11.

KANSAS CITY.

1. Vagrants—charter of Kansas City—ordinance.—The state has granted Kansas City by its charter the express power to restrain and punish vagrants, and to define who shall be considered vagrants, and the provisions of the city ordinance in relation to vagrants are in harmony with the state statute on the same subject, and the city may maintain a proceeding in its own name to impose and collect the fine imposed by such ordinance for its violation, though the ordinance was designed to reach certain vagrants not specifically embraced in the general statutes. *Kansas City v. Neal, 72.*

2. ——— kansas city ordinance—criminal offense.—The offense defined in the Kansas City ordinance, relating to vagrants, is not essentially the same as that defined in section 3485, Revised Statutes, 1889, and the proceeding thereunder does not charge a criminal offense. *Ib.*

3. Kansas city charter—police judge.—The charter of Kansas City provides that there shall be a police judge, who shall have exclusive jurisdiction over all cases arising under any ordinance of the city, and he, therefore, has jurisdiction of an alleged violation of its ordinance relating to vagrants. *Ib.*

4. Practice, appellate—criminal court of kansas city—reviewing facts—presumption.—Section 2155, Revised Statutes, 1889, does not apply to the criminal court of Kansas City, and the appellate court will not review the criminal court in the absence of the evidence, as every presumption is in favor of the judgment. *Ib.*

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5. Kansas city charter—appeals—penal action.—The prosecution of a violation of the ordinance of Kansas City, relating to vagrants, is in its nature a civil action to recover a penalty, and the mode and manner of taking an appeal in such cases is by the terms and provisions of the charter and ordinance of the city prescribed by the statutes governing appeals in civil cases before justices of the peace. *Ib.*

LANDLORD AND TENANT.

1. Crops raised by trespasser.—When an intruder upon land plants crops thereon, such crops, so long as they remain unsevered, are regarded as the property of the land-owner. This rule is applied in this cause against a tenant, who wrongfully retained possession of the premises let to him after his term had expired. *Baker v. McInturff, 505.*

2. Holding tenant and receiving rent from subtenant.—Mere knowledge on the part of the lessor of the occuparcy of another, and acceptance of rent from the occupant, does not show that the lessor has discharged the original lessee from his covenant to pay for the whole term. *Ward v. Krull, 447.*

3. Expiration of lease—holding over by tenant.—When a tenant holds over after the expiration of a written lease, the law, in the absence of a contrary provision by express contract, implies that he holds over subject to the terms of the lease, as far as the same are applicable to a monthly letting. *Haeussler v. Holman Paper-Box Co., 631.*

4. ——— right of grantee of reversion.—If the landlord sells and conveys the reversion after the expiration of the lease, his grantee acquires a right of action for a subsequent breach of the terms of letting thus implied, but none for a breach occurring prior to the conveyance. The purchaser in such case acquires only a right to the premises in the condition in which they are at the time of conveyance. *Ib.*

5. Unlawful detainer—lessee's right of action against lessor. A lessee never in possession, and to whom lessor refuses possession, could not, at common law, maintain unlawful detainer against the lessor, nor can he, under sections 5120 and 5121, Revised Statutes, 1889. (*Sexton v. Hull*, 45 Mo. App. 339, *distinguished.*) *Long v. Noe, 19.*

6. Landlord's statutory remedies for recovery of possession on default in payment of rent.—The remedies provided by sections 6392 and 6397 of the Revised Statutes, 1889, for the recovery of the possession of the rented premises from the tenant for non-payment of rent are different and distinct. Under the former section the possession of the premises and the rent in default can be recovered; under the latter the possession only. The remedy under the former section can only be invoked when the relation of landlord and

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tenant exists, and, therefore, a purchaser from the landlord cannot invoke it, unless the tenant has attorned to him; but such purchaser can proceed under the latter section without such attornment. *Duke v. Compton, 304.*

7. ——— CHANGE FROM ONE REMEDY TO THE OTHER.—A purchaser from the landlord cannot institute an action under said section 6397, and prove a cause of action and recover under said section 6392. *Ib.*

8. ——— EXHIBITION OF DEED BY PURCHASER FROM LANDLORD TO TENANT.—In order to entitle a purchaser of the rented premises from the landlord to the recovery of those premises from the tenant under said section 6397, he must have a deed for the premises, regularly acknowledged from the landlord. The possession by him, and the exhibition by him to the tenant, of a title bond from the landlord for the premises will not suffice. *Ib.*

LAW AND FACT. See PRACTICE, TRIAL, 4, 5, 6.

LIMITATIONS.

LIMITATION OF ACTIONS—ATTORNEY AND CLIENT.—The statute of limitations begins to run in favor of an attorney on a claim for money collected by him for his client, when the client acquires knowledge of the collection. *Donahue v. Bragg, 273.*

LOCAL OPTION. See DRAMSHOPS, 1-3.

MARRIED WOMEN. See HUSBAND AND WIFE, 1-5.

MASTER AND SERVANT.

1. ACTION BY SERVANT BASED ON INJURIES CAUSED BY DEFECTIVE ELEVATOR—SUFFICIENCY OF THE EVIDENCE.—The evidence in this action, which was a suit by a servant against his master for damages for personal injuries caused by the fall of an elevator, is considered, and it is *held* sufficient to establish that the elevator was defective and that the master was negligent in not discovering the defects, and to warrant the submission of the cause to the jury. *Bartley v. Trorlicht, 214.*

2. ——— SPECIFICATION OF DEFECTS—ELECTION.—The petition in the cause having specified a number of defects in the appurtenances of the elevator, which were not inconsistent with each other nor repetitions of each other, but were separate and cumulative specifications of different defects, it is *held* that the plaintiff could not be required to elect on which of these specifications he would go to trial. *Ib.*

3. EXTENT OF MASTER'S OBLIGATION TO FURNISH PROPER APPLIANCES. A master is under an absolute duty to use reasonable care and inspection in regard to the machinery and appliances placed by him in the hands of his servant for use. As between himself and his servant he cannot relieve himself from this responsibility by

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delegating or leaving to another the care of the machinery, and his obligation to his servants in this regard will, therefore, not be affected by the fact that he rented the machinery as part of a building, nor by the further circumstance that a third person, as employe of his landlord, has been intrusted with the supervision of the machinery. *Ib.*

4. LIABILITY OF MASTER FOR TORTIOUS ACT OF SERVANT.—A master is responsible for the tortious act of his servant, if such act was within the scope of the servant's employment, or is shown either directly or inferentially to have been authorized by the master. *Voegeli v. Pickel Marble & Granite Co.*, 643.

5. ——— IMPLIED AUTHORITY FROM MASTER.—The fact that the act of the servant is unlawful will not prevent the implication of an authority for the commission of it from the employment itself. The test is not the lawfulness or the unlawfulness of the means adopted by the servant to accomplish his master's business, but it is whether such means are so far incident to the employment as to come within its scope. And *held* in the case at bar, that authority to servants to deposit rubbish, produced by the master's business, in the street in front of the master's premises carried with it the power or duty of removing the same, and that in burning it in the street the servants acted within the scope of their authority. *Ib.*

6. ——— SUFFICIENCY OF EVIDENCE OF AUTHORITY FROM MASTER. *Held*, also, that proof that the servants were accustomed to burn the rubbish thus deposited in the street by them was some evidence of express authority from the master to them to thus dispose of the rubbish. *Ib.*

7. ——— PLEADING.—In stating a cause of action against a master for the tortious act of his servant, it is not necessary to expressly aver that the servant acted within the scope of his employment or by authority from his master; an allegation, that the defendant by its servants or agents was guilty of the negligent act complained of implies that the act was done about the master's business and within the scope of the servant's employment. *Ib.*

8. ——— INSTRUCTIONS.—An instruction is erroneous, if it authorizes a recovery against the master for the tortious act of his servants without requiring any finding that the servants acted within the scope of their employment or by authority from the master, where this is controverted. *Ib.*

9. CONTRIBUTORY NEGLIGENCE ON PART OF A CHILD—INSTRUCTIONS. An instruction in this cause defined the care, which the plaintiff, who was a child, was bound to exercise, as such care "as boys of his age, experience and discretion usually exercise." *Held, per curiam*, that this instruction was faulty, in that it made the requisite care depend upon the discretion of this particular child instead of the discretion reasonably to be expected of a boy of his age, but

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that the error was not prejudicial so as to necessitate a reversal of the judgment in his favor. But *held*, by THOMPSON, J., that the instruction was correct. *Bartley v. Trorlicht, 214.*

10. MAXIMS.—When one of two innocent parties must suffer, the loss must fall upon him whose negligence brings it about. *Cummings v. Hurd, 139.*

MECHANICS' LIENS.

1. FIXTURES—FURNACE—INSTRUCTION.—In an action to enforce a mechanics' lien for furnishing a hot-air furnace for a dwelling, an instruction telling the jury that, if the furnace rested on the ground, or a platform made for that purpose, and was not permanently fastened down, and that the whole apparatus was so constructed as to be removed without defacing or injuring the walls, then there was no lien, is erroneous, since it omits the question of intention, which is a legal criterion, and mere physical annexation is not a test. *Cooke v. McNeil, 81.*

2. ——— ——— ———. Under the terms of the mechanics' lien statute, the contractor is entitled to a lien for putting a furnace in a dwelling-house, even though the contract provides for a removal in case the furnace does not fill the requirements. *Ib.*

3. INSUFFICIENT ACCOUNT.—An account filed as a mechanic's lien, though filed by the original contractor with the owner of the land, and though for the amount of the agreed contract price, will be insufficient to create a lien, if it consists of a single lumping charge for the erection of the building as per contract. *Neal v. Smith, 328.*

4. SUFFICIENCY OF ACCOUNT.—*Held*, in the course of discussion that the goodness of the mechanic's lien cannot depend upon whether the action for the enforcement of the lien is brought upon an express contract or a *quantum meruit*. *Ib.*

5. JUSTICES' COURTS—SERVICE OF PROCESS.—The finding by a justice that the defendant has absconded from his last usual place of abode, and cannot be found in this county, is not sufficient to authorize an order of publication as it does not appear that defendant could not have been summoned by leaving a copy of the summons at his usual place of abode, etc. *Byrd v. Steele, 419.*

6. ——— PARTIES.—Section 6713, Revised Statutes, 1889, requires that in all suits for the enforcement of mechanics' liens the parties to the contract shall be made a party, and the statute further provides that in all cases where a lien shall be filed by any person other than the contractor, it shall be the duty of the contractor to defend any action brought thereon; and in actions in a justice's court for the enforcement of such a lien no judgment can be rendered unless the contractor is made a party. *Johnson-Frazier Lumber Co. v. Schuler & Muench, 90.*

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7. ——— ——— WAIVER.—In a justice's court the owner does not waive the defense of parties in an action to enforce a mechanic's lien by failing to move to have the contractors made parties. *Ib.*

8. ESSENTIALS TO JUDGMENT OF ENFORCEMENT.—No recovery can be had charging the premises with a mechanic's lien except as incident to a personal judgment against some one with whom the contract for the work or materials was made, who himself is either the owner or standing with the owner or some contractor under him in a contractual relation and then only where the work or material actually entered into the construction of the building or improvement. *Ib.*

MERGER. See MORTGAGES, 5.

MORTGAGE. See CHATTEL MORTGAGE.

1. CONTRACT CONSTRUED AND HELD TO CONSTITUTE A MORTGAGE AND NOT A CONDITIONAL SALE.—A land company by its articles of association provided for the purchase of a tract of land and directed its director on the receipt of the charter to convey the north twenty acres of the tract to a university. Before this conveyance the university ordered the land company to mortgage the twenty acres for its benefit, agreeing that, if it did not pay the mortgage debt when due, it thereby forfeited its right to the conveyance of said twenty acres. Default was made in the payment of the debt, and sale followed. *Held*, the agreement between the land company and university was a mortgage, and not a conditional sale, and the surplus of the mortgage sale belongs to the university and went to its creditors. *White v. University Land Co.*, 450.

2. ——— RULE OF CONSTRUCTION.—If the debt for which the conveyance was made still remains, then the transaction is to be considered as a mortgage rather than a conditional sale, and while the intention should control, if this is in doubt, the conveyance will be held a mortgage rather than a conditional sale. *Ib.*

3. REGISTRY OF ASSIGNMENT.—The registry statute does not require the assignment of a note and mortgage to be recorded, nor require the assignee to notify the successive grantees of the assignor of the assignment. *Bartlett v. Eddy*, 32.

4. ASSIGNMENT—CONVEYANCE TO MORTGAGEE—ESTOPPEL.—SMITH, P. J., *concurring:* Where a mortgagee, after his assignment of the note, takes a quitclaim deed to the mortgaged premises in satisfaction of the note, he is estopped as against his assignee to deny the mortgage lien on the premises, and so are his grantees. GILL, J., *dissenting, holds*, that such transaction bars the foreclosure of the mortgage, the debt and the mortgage being for this purpose inseparable, and when the note is paid the mortgage expires. *Ib.*

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5. CONVEYANCE OF MORTGAGE TO MORTGAGOR NO MERGER.—Where a mortgagee after the assignment of the note to a third party takes a conveyance of the mortgaged premises to himself, equity will not permit such conveyance to operate as a merger of the two estates in him. *Ib.*

6. ASSIGNMENT—PAYMENT BY MAKER.—If the payor, without notice of the assignments, pays the sum due on the note to the assignor, such payment, while it is not properly speaking a payment of the note, will operate as a discharge of, or a defense for, the payor; but will not discharge the lien of a mortgage on lands in the hands of a third party who is not connected with the mortgage. [GILL, J., *dissenting.*] *Ib.*

7. ASSIGNMENT WITHOUT NOTICE—PAYMENT TO ASSIGNOR—EFFECT ON MORTGAGE.—GILL, J., *further dissenting:* Where the assignee of a non-negotiable note secured by a mortgage fails to give notice of the assignment to the payor, the latter is justified in regarding the assignor still the owner or the agent of the owner to receive payment; and payment to the assignor is a complete and entire satisfaction of the debt, and the mortgage security on the land is extinguished with the debt (*doubting Rice v. McFarland*, 34 Mo. App. 404); nor is this position impaired by the rule that, though an action on the debt be barred by the statute of limitations, yet a suit on mortgage may be maintained. *Ib.*

8. ASSIGNMENT—RELEASE BY MORTGAGEE.—The fact that a mortgagee, after assignment of the mortgage debt, enters a satisfaction of the mortgage on the margin of the record cannot affect the rights of his assignee, or his grantees after his subsequent acquisition of the mortgaged premises. *Ib.*

9. SATISFACTION.—The true holder of the note can alone satisfy the record, and the possession of the deed of trust gives no authority, and one who, without the production of the note, takes satisfaction of the deed of trust is charged with notice of the lack of authority. *Cummings v. Hurd*, 139.

10. ——— COSTS.—On full satisfaction of the mortgage debt, the mortgagee, at the request of the mortgagor for a release of the mortgage, has his option to go to the recorder's office and indorse satisfaction on the margin to make and deliver a deed of release; and, if it is reasonably inconvenient to make the marginal entry, he may adopt the other mode at the cost of the mortgagor; and, if he accepts the costs tendered for either mode, he must pursue that mode. *Dodson v. Clark*, 148.

11. ——— ———. A mortgagee cannot be held for not releasing a satisfied mortgage, unless it appear that the alleged payment of costs was made on account of the mortgage sought to be released. *Ib.*

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12. ——— WHAT IS SATISFACTION.—If a mortgagee accepts goods, and delivers up the note and mortgage with intent thereby to relinquish any further claim thereon, then there is a full satisfaction of the mortgage. *Ib.*

MUNICIPAL CORPORATIONS. See KANSAS CITY, 1-5; TAXES, SPECIAL, 1-13.

1. EVIDENCE—JUDICIAL NOTICE—POWERS OF CITY TO RESTRAIN RUNNING AT LARGE OF ANIMALS.—Courts will take judicial notice of the power of a city by ordinance to restrain the running of hogs at large within the corporate limits of the city, outside of the owner's inclosure. *Sherrell v. Murray, 233.*

2. LICENSING THEATRICAL PERFORMANCES—STATUTORY LIMITATION OF POWER OF CITIES OF THE FOURTH CLASS.—A city of the fourth class has no power to levy a license tax upon a theatrical performance, when held in an opera house within its limits, the prohibition of section 8193 of the Revised Statutes of 1889 being valid. *Negrotto v. City of Monett, 286.*

3. PUBLIC WORK—NOTICE OF LETTING CONTRACT.—Notice of the letting of contract for public work, such as street improvement, the cost of which is to be collected from the citizen, *nolens volens*, by special assessment of his property, is a matter which affects the substantial rights of the citizen, and is a condition precedent which must be fairly complied with, whether prescribed by charter or ordinance. The notice in this case *held* sufficient, though last publication was on Sunday, and there was no publication the day of the letting. *Clapton v. Taylor, 117.*

4. ——— LETTING TO LOWEST BIDDER—DUTY OF COUNCIL—PRESUMPTION.—In letting contracts for street improvements the duty of city authorities is not wholly ministerial, but partakes sufficiently of a judicial character, in the absence of fraud or misconduct, to render their conclusion binding; and the law in regard to the letting of such contracts does not mean absolutely that the contract shall be given to the lowest bidder without regard to fitness, and the city authorities are presumed to have done, and not to have exceeded, their duty. *Ib.*

5. SECOND-CLASS CITIES—CHANGING STREET GRADES.—In cities of the second class the grade of streets can only be changed by ordinance passed by the council and approved by the mayor; and the city will not be liable for the filling of a street above the grade by persons assuming to act under its authority. *Gehling v. City of St. Joseph, 430.*

6. TOWNS—ESTABLISHMENT OF STREETS—REPAIRS.—A highway situated within the corporate limits of a town and used by the public for travel becomes for all legal purposes a street, and, while it is thus

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used by the public, the duty of repairing it rests exclusively upon the town. It is not necessary that the adoption of the highway as a street of the town should be made by ordinance. *Walker v. Point Pleasant*, 244.

7. LIABILITY FOR INJURIES CAUSED BY DEFECT IN HIGHWAY.—In order to render a municipal corporation responsible for injuries caused by defects in one of its public highways, express notice to it of the defects need not be shown; it will suffice, in respect to notice, that the municipal authorities might have known of the defects by the exercise of ordinary care. *Ib.*

8. EVIDENCE—ORDINANCE—INJURY ON SIDEWALK.—In an action against a city for an injury on its sidewalk, it is error to admit in testimony an ordinance manifestly referring to holes, etc., on private property. *Hunter v. City of Mexico*, 17.

9. ACTION FOR INJURY ON HIGHWAY—PLEADING.—The petition in this cause is considered, and *held* to state a cause of action against a municipal corporation for injuries occasioned by defects in a public highway within the corporate limits. *Walker v. Point Pleasant*, 244.

10. PLEADINGS—DENIAL OF INCORPORATION.—Section 2186 of the Revised Statutes of 1889 applies to municipal corporations as well as private corporations, and, under its provisions, the corporate existence of a defendant sued as a municipal corporation is admitted, unless denied by plea under oath. *Ib.*

NEGLIGENCE. See AGISTMENT; MASTER AND SERVANT, 1-3; MUNICIPAL CORPORATIONS, 7-9; RAILROADS, 1-10.

1. PLEADING.—It is a good and sufficient pleading of negligence at common law on the part of a railway company to set out and describe the acts done with a reasonable degree of particularity, and then allege that they were negligently done. *Hill v. Railroad*, 520.

2. ———. Negligence in fact may consist of any number of negligent acts preceding the injury and leading up to it and contributing to it. In stating a case of action therefor, the plaintiff is not obliged to select one of these acts and rely upon it. And *held* in this action, which was one for the killing of stock by a railway train, the petition, which alleged in one count a number of negligent acts on the part of the railway company conducing to the injury complained of, stated but a single cause of action. *Ib.*

3. ——— SPECIFICATION OF DEFECTS—ELECTION.—The petition in the cause having specified a number of defects in the appurtenances of the elevator, which were not inconsistent with each other nor repetitions of each other, but were separate and cumulative specifications of different defects, it is *held* that the plaintiff could not be required to elect on which of these specifications he would go to trial. *Ib.*

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4. ——— DIMINISHED EARNING CAPACITY OF MINOR AFTER MAJORITY. When the plaintiff in such an action is a minor, he need not specially plead as damages that his earning capacity after he will have attained his majority will be diminished; moreover, a general allegation of permanent disability to labor by reason of the injuries complained of embraces a claim for such damages. *Ib.*

5. DIMINISHED EARNING CAPACITY OF MINOR AFTER MAJORITY—EVIDENCE.—Such damages may be allowed in favor of a minor, though there is no direct evidence of them, their amount being referred to the judgment of the jury as a matter of common experience. *Ib.*

6. CONTRIBUTORY NEGLIGENCE.— Contributory negligence, debarring the plaintiff's right of recovery, exists only where the negligence of plaintiff contributed proximately to the injury sued for; it does not exist where the injury sued for and that resulting from the fault of the plaintiff are disconnected. *Pinnell v. Railroad, 170.*

7. ———. Though the injury and defendant's negligence are conceded, and the testimony strongly preponderates against plaintiff on his contributory negligence, yet, if the plaintiff testifies that before crossing the track he slowed up his buggy till it did not prevent his hearing all he could have heard if he had come to a full stop, the case should go to the jury. *Masterson v. Railroad, 6.*

8. ——— BURDEN OF PROOF.—It is not incumbent upon the plaintiff in the first instance to show that he was free from negligence, or in the exercise of ordinary care, but the concurring negligence of the plaintiff is matter of defense, and the burden of showing it is on the defendant; and the instructions in this case are approved. *Churchman v. Kansas City, 366.*

9. ——— PLEADING.—Contributory negligence is an affirmative defense, and, if relied on, must be pleaded. If not pleaded, the question of its existence should not be submitted to the jury as an issue of fact; in such case it will only debar a recovery by the plaintiff, when it is conclusively established by the evidence of the plaintiff himself. *Voegeli v. Pickel M. & G. Co., 643.*

10. CONTRIBUTORY NEGLIGENCE ON PART OF A CHILD—INSTRUCTIONS. An instruction in this cause defined the care, which the plaintiff, who was a child, was bound to exercise, as such care "as boys of his age, experience and discretion usually exercise." *Held, per curiam*, that this instruction was faulty, in that it made the requisite care depend upon the discretion of this particular child instead of the discretion reasonably to be expected of a boy of his age, but that the error was not prejudicial so as to necessitate a reversal of the judgment in his favor. But *held* by THOMPSON, J., that the instruction was correct. *Bartley v. Trorlicht, 214.*

NEW TRIALS.

FOR RULINGS appertaining to motions for new trial, see Practice, 9, 10, 11, 16.

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NUISANCES.

1. OBSTRUCTION OF WATERCOURSES—RIGHT OF ACTION OF A SUBSEQUENTLY INCOMING TENANT.—If a watercourse is wrongfully obstructed by the building of a permanent embankment (in this cause this was done by a railway company in the construction of its road), a tenant of adjacent land, though he rents the land after the erection of the embankment and with knowledge thereof, can recover from the wrongdoer the damages to his crops from overflows caused by such obstruction. *McKee v. Railroad, 174.*

2. ——— FORMER RECOVERY.—When several annual crops are destroyed by different overflows, thus occasioned, the tenant may sue for the injury to each crop as it occurs, and, therefore, a former suit will be no bar to a recovery in another action for damages suffered subsequently to the institution of the first suit. *Ib.*

3. ——— MEASURE OF DAMAGES.—The damages recoverable by the tenant in such an action consist of the injury done to the crop sued for. Where a tenant is not prevented by such an overflow from cultivating the land held by him, he is not entitled to the depreciation in the rental value of the land in consequence of such obstruction. *Ib.*

PARTIES. See MECHANICS' LIENS, 6, 7; PLEADINGS, 2, 3.

PRINCIPAL AND AGENT—AGENT SUING IN HIS OWN NAME—COMMON LAW—STATUTE.—Where a contract is in terms made with the agent personally, he may sue on it, although the fact of the agency and the name of the principal are known, and this rule holds under the statute as well as at common law. *Harrigan v. Welch, 496.*

PARTNERSHIP.

FOR RULING as to the liability of shareholders of a corporation as partners, see Corporations, 1, 2.

PAYMENT. See PROMISSORY NOTES, 5–9.

PERSONAL PROPERTY. See REPLEVIN, 1.

PLEADINGS.

1. MUNICIPAL CORPORATION—DENIAL OF INCORPORATION.—Section 2186 of the Revised Statutes of 1889 applies to municipal corporations as well as private corporations, and, under its provisions, the corporate existence of a defendant sued as a municipal corporation is admitted, unless denied by plea under oath. *Walker v. Point Pleasant, 244.*

2. OBJECTION TO PARTIES BY ANSWER.—*Held*, BIGGS, J., *dissenting*, that, in order to raise the objection that there is a misjoinder of parties plaintiff, an answer must in terms object to the action on that ground; it will not suffice that the answer states facts, showing that the alleged cause of action of plaintiffs, suing jointly, is not joint but several. *Donahue v. Bragg, 273.*

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3. ——— WAIVER OF SUCH OBJECTION.—A party cannot at the same time raise issues of law and of fact going to the entire pleading of the adverse party; by raising the issues of fact, he waives those of law. *Held*, accordingly, that a defendant has not the right at the same time to answer the petition of the plaintiff and to demur thereto for misjoinder of parties. *Ib.*

4. PLEADING—CONDITIONS PRECEDENT.—A petition must allege the performance of a condition precedent to the right of recovery, or else sufficient excuse for the non-performance of the condition; otherwise it will be bad on demurrer. *Beckman v. Ins. Co., 604.*

5. ——— CURING THE ABSENCE OF ESSENTIAL AVERMENTS.—But where the petition fails to make either such allegation, and the answer affirmatively pleads non-performance, and the plaintiff takes issue by reply, the defect in the petition will be helped out by the subsequent pleadings. *Ib.*

6. JUSTICES' COURTS—DENIAL OF COUNTERCLAIM.—In an action before a justice of the peace, the plaintiff does not admit a counterclaim, filed by the defendant, by not pleading thereto. In such actions, affirmative matter set up by either party is understood to be denied, though no formal denial is filed. *Lamb v. Bush, 337.*

7. EVIDENCE OF SPECIAL DAMAGES WHICH HAVE NOT BEEN PLEADED—WAIVER OF OBJECTION.—*Held*, in the course of discussion, that if evidence of special damages is admitted without objection, the right of objection on the ground that the damages were not specially pleaded is lost. *Bartley v. Trorlicht, 214.*

8. DAMAGES—INSTRUCTION—EVIDENCE—REMITTITUR.—The petition in an action for personal injury alleged that plaintiff had been compelled to spend $100 in endeavoring to be cured; there was no evidence of what he had paid his physicians; the instructions told the jury to allow plaintiff all the expenses incurred, whether yet paid or not, in and about the treatment of his case. *Held*, reversible error, and the appellate court cannot cure it by *remittitur*. *Hunter v. City of Mexico, 17.*

9. RECOVERY ON THEORY INCONSISTENT WITH THE PLEADINGS.—A plaintiff cannot recover upon a theory of the case adverse to that upon which his petition proceeds. *Steinberg v. Ins. Co., 255.*

10. MINORS—DIMINISHED EARNING CAPACITY AFTER MAJORITY.—When the plaintiff in such an action is a minor, he need not specially plead as damages that his earning capacity, after he will have attained his majority, will be diminished; moreover, a general allegation of permanent disability to labor, by reason of the injuries complained of, embraces a claim for such damages. *Bartley v. Trorlicht, 214.*

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11. Divorce—allegation of residence in county.—In a petition for divorce it is not necessary to allege that plaintiff is a resident of the county in which the action was begun. *(Denying Pate v. Pate, 6 Mo. App. 49.) Gant v. Gant, 3.*

12. Fraudulent entry of judgment.—In a petition seeking to set aside a judgment entered by the judge in vacation, etc., it is not necessary to allege in terms that the entry thus made was conceived in fraud, etc. It is sufficient to state the facts, and in this case the facts stated and proved constitute fraud in law. *Dingle v. Pollick, 479.*

13. Highways.—The petition in this cause is considered, and *held* to state a cause of action against a municipal corporation for injuries occasioned by defects in a public highway within the corporate limits. *Walker v. Point Pleasant, 244.*

14. Bill of interpleader.—It will not be sufficient for a bill of interpleader to state that the defendants make conflicting claims to the same fund in the hands of the plaintiff stakeholder, and that the plaintiff does not know to which of them to pay the fund. The bill will be bad on demurrer, unless it states the nature of these conflicting claims sufficiently to show a color of right to the fund on the part of each claimant. *Robards v. Clayton, 608.*

15. Action for tort of servant.—In stating a cause of action against a master for the tortious act of his servant it is not necessary to expressly aver that the servant acted within the scope of his employment, or by authority from his master; an allegation that the defendant, by its servants or agents, was guilty of the negligent act complained of, implies that the act was done about the master's business, and within the scope of the servant's employment. *Voegeli v. Pickel M. & G. Co., 643.*

16. Specification of defects in machinery furnished by master—election.—The petition in the cause having specified a number of defects in the appurtenances of the elevator, which were not inconsistent with each other nor repetitions of each other, but were separate and cumulative specifications of different defects, it is *held* that the plaintiff could not be required to elect on which of these specifications he would go to trial. *Bartley v. Trorlicht, 214.*

17. Contributory negligence.—Contributory negligence is an affirmative defense, and, if relied on, must be pleaded. If not pleaded the question of its existence should not be submitted to the jury as an issue of fact; in such case it will only debar a recovery by the plaintiff, when it is conclusively established by the evidence of the plaintiff himself. *Voegeli v. Pickel M. & G. Co., 643.*

18. Negligence.—It is a good and sufficient pleading of negligence at common law on the part of a railway company to set out and describe the acts done with a reasonable degree of particularity, and then allege that they were negligently done. *Hill v. Railroad, 520.*

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19. PLEADING NEGLIGENCE—ACTION AGAINST RAILWAY COMPANY FOR KILLING STOCK.—Negligence in fact may consist of any number of negligent acts preceding the injury and leading up to it and contributing to it. In stating a cause of action therefor, the plaintiff is not obliged to select one of these acts and rely upon it. And *held* in this action, which was one for the killing of stock by a railway train, the petition, which alleged in one count a number of negligent acts on the part of the railway company conducing to the injury complained of, stated but a single cause of action. *Ib.*

20. ——— RECOVERY UNDER GENERAL ALLEGATION OF NEGLIGENCE. *Held, arguendo,* that, under a general allegation of negligence on the part of a railway company in an action against it for single damages for the killing of stock, the plaintiff may succeed either by proving negligence at common law, or by proving the constructive statutory negligence in failing to erect and maintain fences at a requisite place. *Ib.*

21. ——— DETERMINATION OF CHARACTER OF ACTION.—To determine whether a petition states a statutory or common-law cause of action for the killing of stock by a railway company, it is necessary to consider whether, in order to recover under the petition, the plaintiff must prove the kind of negligence named in the statute, that is, the failure on the part of the railway company to erect and maintain a lawful fence, or whether he can succeed by proving what would be negligence at common law. *Ib.*

POLICE COURT. See KANSAS CITY, 3-5.

POWERS.

ADMINISTRATION—ALLOWANCE OF DEMANDS CREATED AFTER DECEASE OF THE DECEDENT—POWER COUPLED WITH INTEREST.—A power coupled with an interest survives the death of the grantor of it; and when such power authorizes the grantee of it to contract debts and charge the grantor therewith—as was held to be the case herein—a debt contracted by the grantee in pursuance of it, though after the death of the grantor, may be presented and allowed as a demand against the estate of the latter. *Lockart v. Forsythe,* 654.

PRACTICE, APPELLATE.

1. REVIEW OF MATTER OF RECORD.—When judgment is rendered in the trial court upon motion, and the judgment entry clearly shows the nature of the motion, the action of that court in rendering the judgment may be reviewed as a matter of error as distinguished from matter of exception. *State ex rel. v. Chaney,* 511.

2. FINDING OF FACTS UNDER STATUTE—CONCLUSIONS OF LAW AND FACT—APPELLATE PRACTICE.—Section 2135, Revised Statutes, 1889, is practically the same as section 2 in the practice act of 1849; and makes it the duty of the court, at the request of either party, to state in writing its finding of facts and conclusions of law thereon

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separately, which become a part of the record proper, and, if the finding of facts does not support the judgment, the appellate court will reverse for error apparent on the record; such finding of facts is a substitute for a special verdict, though not so critically considered, and facts will only be presumed when they can be legally presumed from the facts found. *Nichols v. Carter, 401.*

3. ——— INSTRUCTIONS.—Under the statute relating to the court's finding separate conclusions of fact and law, the court must declare the conclusions of law, on the facts found only, and such conclusions do not fully take the place of instructions, and the court need not state hypothetical states of fact, and the law thereon, after the manner of instructions. *Ib.*

4. ——— OBJECT OF STATUTE—EFFECT ON APPELLATE PRACTICE.—The object of the statute in reference to the court's conclusions of law and fact is to permit parties to make a case for the revision of the appellate court in which the facts and the law appear separately without instructions or bills of exceptions, but, in order to attack the finding of facts, the evidence must be preserved in a bill of exceptions. *Ib.*

5. EVIDENCE OF FILING OF BILL OF EXCEPTIONS—CLERK'S INDORSEMENT OF FILE MARK ON PAPERS.—The indorsement, made by the clerk on a bill of exceptions, of the fact and date of the filing of the paper is competent evidence of those matters. *Steinberg v. Ins. Co., 255.*

6. ———. The mere recital by the clerk in the transcript that a bill of exceptions was filed is not sufficient evidence of the filing of the bill, when the transcript shows no record entry to that effect, and the bill itself does not contain a file mark. *State ex rel. v. Chaney, 511.*

7. FILING OF BILL OF EXCEPTIONS OUT OF TIME.—When a bill of exceptions is filed out of time, this court can only review rulings which appear from the record proper, and, in the absence of error in a ruling so appearing, must affirm the judgment appealed from. *Cramer v. Aiken, 163.*

8. PRESUMPTIONS.—A demurrer to a defective petition was sustained, whereupon the petition was by leave of court amended by interlineation, and the defendant answered. On appeal the transcript failed to show what interlineations were thus made. *Held*, that it must be presumed that they were sufficient to cure the defects in the petition. *Beckman v. Ins. Co., 604.*

9. ——— ALIMONY TO DEFRAY COUNSEL FEES.—The allowance of such alimony is not a matter of right under all circumstances, but facts may appear at the hearing of the application therefor which will justify the refusal of it. Accordingly, an order refusing it cannot be reviewed, when it does not appear what evidence was developed

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as to the merits of the application at the hearing thereof; since, in such case, it cannot be said that the trial court abused its discretion in the premises. *Adams v. Adams, 592.*

10. ———. It cannot be presumed that the trial court failed to properly admonish the jury at the time of an adjournment in a criminal proceeding, when the record fails affirmatively to show that this was the case. *State v. Matheis, 237.*

11. OBJECTIONS AND EXCEPTIONS IN TRIAL COURTS.—For rulings in regard to the manner and necessity of making and of saving objections in the trial court, see Practice, Trial, 8–14.

12. AFFIRMANCE OF JUDGMENT FOR FAILURE TO FILE TRANSCRIPT.—If an appeal is granted by the trial court after the lapse of the term at which final judgment was rendered, so that the order granting it was invalid, the judgment cannot be affirmed in this court for the failure of the appellant to duly file a transcript therein. *Beckman v. Ins. Co., 343.*

13. REQUISITES OF ABSTRACT OF RECORD.—In order that an appellant, who has filed an abstract of the record in lieu of a transcript, should be in a position to complain of matters of exception as distinguished from matter appearing from the record proper, his abstract must affirmatively show that an exception was taken and duly preserved to the ruling complained of. It must, therefore, show affirmatively that the bill of exceptions was properly filed, and should also contain the motion for new trial or in arrest of judgment, the date of the filing of the same, and the action of the court thereon. *Hohstadt v. Daggs, 157.*

14. ABSTRACT OF EVIDENCE.—In order for the appellate court to review the action of the trial court in refusing to give a peremptory instruction, the evidence must be set out in the abstract. *Colburn & Hamilton v. Brunswick Flour Co., 415.*

15. ——— EXCESSIVE DAMAGES.—Where the abstract contains no evidence as to the extent of the damages, the appellate court cannot review the excessiveness of the verdict, as it assumes everything in favor of the verdict and the action of the trial court. *Churchman v. Kansas City, 366.*

16. ———. Where there is no sufficient evidence in the abstract to support the plea of estoppel, it becomes unnecessary to consider whether that defense is well pleaded. *Cummings v. Hurd, 139.*

17. SPECIFICATION OF MATTER COMPLAINED OF AS ERROR.—It is the duty of an appellant to make such a statement of the facts as will make apparent the relevancy of his assignments of error. In this cause the appellant assigned as error the refusal of an instruction, which directed the jury to disregard all evidence not of a certain character, but failed to point out any evidence to which the instruction could apply, and the assignment was, therefore, disregarded by this court. *Lamb v. Bush, 337.*

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18. ———. *Held*, also, that an assignment of error in the admission of evidence will be disregarded, when the appellant fails to point out the evidence objected to. *Ib.*

19. EQUITY—REVIEWING EVIDENCE—DEFERRING TO TRIAL COURT.—In equity cases, the appellate court reviews the entire testimony, and, if convinced that a wrong finding was made, will set it aside and enter the proper judgment, but in cases of doubt may defer somewhat to the finding of the trial court. *Thomas v. Railroad, 110.*

20. MATTERS OF FACT.—In reviewing the judgment in an action at law, this court cannot treat a fact as established, when it is not conceded by the evidence nor found by the verdict. *Whitlock v. Appleby, 295.*

21. REVIEW OF FINDING OF FACT.—Where the preponderance of the evidence against the verdict in an action at law is so strong as to raise a presumption of prejudice, corruption or gross ignorance, on the part of the jury, a new trial will be granted on appeal. *Walton v. Railroad, 620.*

22. ———. This court is concluded by the finding of the jury on an issue of fact in an action at law, when the finding is supported by reasonable and fair inferences which are authorized by the evidence. *Craig v. Kelly, 312.*

23. ———. An appellate court has nothing to do with the credibility of witnesses in determining the sufficiency of the evidence to support the verdict in an action at law. *Bunker v. Hibler, 536.*

24. ———. With the propriety of the finding of facts by the trial court so long as they have testimony tending to support them, the appellate court has nothing to do. *Nichols v. Carter, 401.*

25. EVIDENCE—REJECTION OF, WHEN NON-PREJUDICIAL.—When the admission of evidence could not vary the result, its rejection is non-prejudicial. *Colburn & Hamilton v. Brunswick Flour Co., 415.*

26. NON-PREJUDICIAL ERROR—EXPRESSION OF OPINION BY TRIAL JUDGE. At the close of the evidence in this cause, the trial judge expressed an opinion, unfavorable to the appellant, of the legal effect of certain evidence; but immediately thereafter, and after an examination of the authorities, he stated in open court that the opinion which he had expressed was erroneous; he also gave an instruction to the jury correctly stating the law upon the subject. *Held*, that this expression of opinion did not constitute prejudicial error. *Craig v. Kelly, 312.*

27. NON-PREJUDICIAL ERROR.—The refusal of the trial court to require the plaintiff to elect between two causes of action, even when erroneous, is not prejudicial when that court limits him to the proof of one of the causes. *Pinnell v. Railroad, 170.*

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28. JUDGMENT FOR RIGHT PARTY.—The judgment in the cause is affirmed on the ground that it is for the right party. *Milstead v. Equitable Mortgage Co., 191.*

29. DAMAGES—INSTRUCTION—PLEADING—EVIDENCE—REMITTITUR.—The petition in an action for personal injury alleged that plaintiff had been compelled to spend $100 in endeavoring to be cured; there was no evidence of what he had paid his physicians. The instructions told the jury to allow plaintiff all the expenses incurred, whether yet paid or not, in and about the treatment of his case. *Held*, reversible error, and the appellate court cannot cure it by *remittitur*. *Hunter v. City of Mexico, 17.*

PRACTICE, TRIAL. See PLEADING, 16.

1. ADMISSION OF EVIDENCE NOT COVERED BY PLEADINGS—SUFFICIENCY OF OBJECTION.—*Semble*, that an objection to the admissibility of evidence on the ground of the irrelevancy of the evidence covers the ground that the evidence is not admissible under the pleadings. *Baker v. McInturff, 505.*

2. EVIDENCE OF SPECIAL DAMAGES WHICH HAVE NOT BEEN PLEADED—WAIVER OF OBJECTION.—*Held*, in the course of discussion, that if evidence of special damages is admitted without objection, the right of objection on the ground that the damages were not specially pleaded is lost. *Bartley v. Trorlicht*, 214.

3. RECOVERY ON THEORY INCONSISTENT WITH THE PLEADINGS.—A plaintiff cannot recover upon a theory of the case adverse to that upon which his petition proceeds. *Steinburg v. Ins. Co., 255.*

4. LAW AND FACT—INTERPRETATION AND EFFECT OF LETTER.—The defendant in this cause transmitted money to a third person in a letter containing directions in regard to the application of the money. *Held*, that the interpretation of the letter was a matter of law for the court, and that the letter showed that the remittance was made to this third person as agent for the defendant, and not as agent for the plaintiff, and was conclusive against the defendant upon that issue. *Milstead v. Equitable Mortgage Co., 191.*

5. ——— STOPPING AT STATION—ALIGHTING FROM MOVING TRAIN. Whether it is imprudent and careless for a passenger to attempt, at the station of his destination, when it has been announced and the train slowed up, but not stopped, to alight from the still moving train after it has passed the depot, depends on all the circumstances and is a proper question for the jury. *Richmond v. Railroad, 101.*

6. FINDINGS OF LAW AND FACT.—Under the statute relating to the court's finding separate conclusions of fact and law, the court must declare the conclusions of law on the facts found only, and such conclusions do not fully take the place of instructions, and the court need not state hypothetical states of fact, and the law thereon, after the manner of instructions. *Nichols v. Carter, 401.*

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7. ON THE SUBJECT of findings of fact and law under this statute, see Practice, Appellate, 2, 4.

8. EXCEPTIONS TO INSTRUCTIONS.—The action of the trial court in giving instructions cannot be reviewed on appeal, when no exception thereto has been saved in the trial court. *Lamb v. Bush, 337.*

9. EVIDENCE—GENERAL OBJECTION—MOTION FOR NEW TRIAL.—A general objection to evidence cannot be made the basis of an exception; and the motion for a new trial must make sufficient reference to objectionable evidence to secure its review in the appellate court. *Churchman v. Kansas City, 366.*

10. ABSENCE OF JUDGE—MOTION FOR NEW TRIAL.—While it is improper for a trial judge, with or without consent, to absent himself from the court-room during argument, still the judgment cannot be impeached on that account unless such impropriety is made one of the grounds of the motion for a new trial. *Colburn & Hamilton v. Brunswick Flour Co., 415.*

11. IMPROPER REMARKS IN CLOSING ARGUMENT—MOTION FOR NEW TRIAL. Improper remarks of counsel making a case which the law will not allow, if objected to and unrebuked, constitute ground for reversal; but such remarks must be set forth in *hæc verba* in the bill of exceptions, and it is not sufficient in itself to present them in a motion for a new trial, nor to state their tendency. *Churchman v. Kansas City, 366.*

12. ——— REMARKS OF COUNSEL TO JURY.—*Held*, that improper remarks of the counsel of the successful party to the jury were not ground for a new trial, inasmuch as they were checked by the reprimand of the court and not repeated. *Walton v. Railroad, 620.*

13. ——— MATTERS NOT IN THE BILL OF EXCEPTIONS.—Where matters, such as improper remarks of counsel at the argument, and affidavits in support of the motion for a new trial, do not appear in the bill of exceptions, the appellate court cannot notice them. *Havens v. Lawton, 1.*

14. ——— NECESSITY OF OBJECTION.—Though remarks of counsel be improper, unless objection is made to the judge (though a temporary one) there is nothing on which to base an exception for appellate review. *Colburn & Hamilton v. Brunswick Flour Co., 415.*

15. REPLEVIN—WAIVER OF OBJECTION TO VERDICT.—Even if the value of each separate article of property ought to be found by the jury in a replevin case, an error in failing so to find is waived, if not objected to at the return of the verdict. *Herring v. Corder, 378.*

16. MOTION FOR NEW TRIAL—TIME FOR FILING.—A motion for new trial must be filed within four secular or working days after the trial; otherwise exceptions taken at the trial will not be preserved by it. Nor will the fact that the trial court was not in session during these

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four days serve to extend the time for the filing of the motion. (*Clerks' Savings Bank v. Thomas*, 2 Mo. App. 367, is overruled.) *Beckman v. Ins. Co., 604.*

17. REVERSAL OF JUDGMENT ON APPEAL—JUDGMENT IN TRIAL COURT WITHOUT RETRIAL OF CAUSE.—When an appellate court simply reverses the judgment appealed from and remands the cause, the entry of judgment in the trial court without a retrial of the cause is not warranted, unless legal propositions only are involved, and they depend solely upon conceded or written evidence, the legal effect of which was determined by the appellate court. *State ex rel. v. Chaney, 511.*

PRINCIPAL AND AGENT.

1. AGENCY, HOW CREATED.—An agency may be created by the express words or acts of the principal, or it may be implied from his conduct and acquiescence, and the nature and extent of the agent's authority may be implied from circumstances, but will be limited to acts of like nature with those acquiesced in by the principal. *Cummings v. Hurd, 139.*

2. AGENT SUING IN HIS OWN NAME—COMMON LAW—STATUTE.—Where a contract is in terms made with the agent personally, he may sue on it, although the fact of the agency and the name of the principal are known, and this rule holds under the statute as well as at common law. *Harrigan v. Welch, 496.*

3. REAL-ESTATE AGENT—COMMISSIONS, WHEN EARNED.—A real-estate agent is not entitled to commissions for a sale, made after the revocation of his authority to sell, or for a sale made to a purchaser not of his procurement. *Vandyke & Co. v. Walker, 381.*

PRINCIPAL AND SURETY.

1. EFFECT OF MERE NON-ACTION OF CREDITOR IN ENFORCEMENT OF ADDITIONAL SECURITY.—A creditor of two debtors, who occupy the relation of principal and security, does not impair his claim against the surety by mere non-action or neglect in enforcing a lien against the property of the principal debtor, obtained from such principal through his own exertions after the contraction of the debt, as where, after the recovery of judgment against both debtors, he obtained a chattel mortgage on property of the principal debtor, the benefit whereof is lost owing to its not being acknowledged and, therefore, not recorded, and to the sale of the mortgaged chattels by the principal debtor. *English v. Seibert, 563.*

2. EFFECT OF VOLUNTARY SURRENDER OF ADDITIONAL SECURITY BY CREDITOR.—A distinction is, however, drawn between the effect in this respect of mere non-action or neglect on the part of the creditor, and affirmative action on his part in voluntarily surrendering such additional security, it being conceded that such voluntary surrender will operate as a release of the surety to the extent of the value of such additional security. *Ib.*

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PROBATE COURT. See ADMINISTRATION, 5-7.

PROMISSORY NOTES.

1. DEFINITIONS — "NEGOTIATED." — "Negotiated" in section 735, Revised Statutes, 1889, means more than indorsement only; it means delivery as well, or put upon the market. *Lowrie v. Zunkel*, *153*.

2. NOTE—PAYABLE TO MAKER—LAW MERCHANT—STATUTE.—By the law merchant a note payable to the order of the maker is a nullity till negotiated, but when negotiated by indorsement and delivery it becomes payable to the bearer; by section 735, Revised Statutes, 1889, such a note becomes payable to the bearer by delivery for value without indorsement. *Ib.*

3. ASSIGNMENT OF CHOSES IN ACTION—EFFECT AT COMMON LAW AND UNDER STATUTE.—At common law the assignment of choses in action was not recognized, and was only vitalized by equity and through the use of the assignor's name, and the title thereto was not perfected as against the debtor till notice of the assignment to him; but, under the statute, the assignment and delivery of bonds and notes immediately vests the legal title in the assignee without notice, and he may sue in his own name, while in the case of such choses in action as are not capable of manual delivery notice seems necessary to complete the title. *Bartlett v. Eddy, 32*.

4. ASSIGNMENT OF NOTE—DISCHARGE BY ASSIGNOR—DEFENSE. — The present statute puts it out of the power of the assignor to release a note after he has assigned it, but reserves to the payor (and to him alone) the defense which accrued to him before notice of the assignment. GILL, J., *dissenting, holds*, that in this case, though there was an assignment as between the assignor and assignee, yet it was not effective as against the debtor without notice. *Ib.*

5. ——— PAYMENT BY MAKER—MORTGAGE.—If the payor, without notice of the assignment, pays the sum due on the note to the assignor, such payment, while it is not properly speaking a payment of the note, will operate as a discharge of, or a defense for, the payor, but will not discharge the lien of a mortgage on lands in the hands of a third party who is not connected with the mortgage. [GILL, J., *dissenting*.] *Ib.*

6. ——— ———. Payment to an assignor after an assignment of a non-negotiable note amounts to nothing more than a defense to the payor alone, and to no one else save those who by their relation to the payor could compel him to make good their loss. *Ib.*

7. ——— NOTICE—PAYMENT TO ASSIGNOR—EFFECT ON MORTGAGE. GILL, J., *further dissenting*. Where the assignee of a non-negotiable note secured by a mortgage fails to give notice of the assignment to the payor, the latter is justified in regarding the assignor still the owner or the agent of the owner to receive payment; and payment

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to the assignor is a complete and entire satisfaction of the debt, and the mortgage security on the land is extinguished with the debt (*doubting Rice v. McFarlaud*, 34 Mo. App. 404); nor is this position impaired by the rule that, though an action on the debt be barred by the statute of limitations, yet a suit on mortgage may be maintained. *Ib.*

8. PAYMENT OF SECURITY TO ONE IN POSSESSION.—If a debtor pays a written security to one as agent it is his duty at his peril to see that the person thus paid is in possession of the security; and if such person is not in possession thereof, the debtor must show that such person has special authority, or has been represented by the creditor to have such special authority. *Cummings v. Hurd, 139.*

9. PAYMENT AT PLACE DESIGNATED BUT WITHOUT PRODUCTION OF NOTE. Designating the office of a certain person as the place of payment of a note does not give such person authority to collect the note; the payor should always insist on the production of the note, and where there is any suspicion as to the agency should inquire of the principal. *Ib.*

PUBLICATION. See MECHANICS' LIENS, 5.

RAILROADS.

1. OBLIGATION TO STOP AT STATION.—A railroad contracts with its passengers to stop its trains and remain at the station a sufficient length of time for them to leave its train in safety. *Richmond v. Railroad, 104.*

2. STOPPING AT STATION—ALIGHTING FROM MOVING TRAIN—JURY QUESTION.—Whether it is imprudent and careless for a passenger to attempt, at the station of his destination, when it has been announced, and the train slowed up, but not stopped, to alight from the still moving train after it has passed the depot, depends on all the circumstances and is a proper question for the jury. *Ib.*

3. JUSTICES' COURTS—JURISDICTION OF ACTION AGAINST RAILWAY COMPANY FOR KILLING STOCK.—In order to warrant a recovery in an action against a railroad company instituted before a justice of the peace for the negligent killing of cattle, it must be shown that the cattle were killed in the township in which the action was commenced, or in an adjoining township. *Whitesides v. Railroad, 250.*

4. STATUTORY ACTION FOR INJURY TO STOCK—INSTRUCTIONS.—An instruction in a statutory action against a railway company for double damages for the killing of stock, which authorizes a recovery without a finding that the stock came upon the railway tracks at a point where the statute required the company to fence its right of way, is erroneous; and the error is prejudicial when, under the evidence, it is uncertain whether the stock came upon the tracks at such a point. *Roberts v. Railroad, 164.*

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5. ——— COMMON-LAW RIGHT OF ACTION.—The statute for the recovery of single damages against railroad companies for the killing of stock (R. S. 1889, sec. 4428) does not provide for an exclusive remedy, but is cumulative and does not displace the common law in the situation to which it applies. *Hill v. Railroad*, 520.

6. ACTION FOR KILLING OF STOCK—RECOVERY UNDER GENERAL ALLEGATION OF NEGLIGENCE.—*Held, arguendo*, that, under a general allegation of negligence on the part of a railway company in an action against it for single damages for the killing of stock, the plaintiff may succeed either by proving negligence at common law, or by proving the constructive statutory negligence in failing to erect and maintain fences at a requisite place. *Ib.*

7. ——— PLEADING—DETERMINATION OF CHARACTER OF ACTION.—To determine whether a petition states a statutory or common-law cause of action for the killing of stock by a railway company, it is necessary to consider whether, in order to recover under the petition, the plaintiff must prove the kind of negligence named in the statute, that is, the failure on the part of the railway company to erect and maintain a lawful fence, or whether he can succeed by proving what would be negligence at common law. *Ib.*

8. ——— ———. It is a good and sufficient pleading of negligence at common law on the part of a railway company to set out and describe the acts done with a reasonable degree of particularity, and then allege that they were negligently done. *Ib.*

9. ——— ———. Negligence in fact may consist of any number of negligent acts preceding the injury and leading up to it and contributing to it. In stating a cause of action therefor the plaintiff is not obliged to select one of these acts and rely upon it. And *held* in this action, which was one for the killing of stock by a railway train, the petition, which alleged in one count a number of negligent acts on the part of the railway company conducing to the injury complained of, stated but a single cause of action. *Ib.*

10. ——— NEGLIGENCE IN FAILING TO DISCOVER STOCK.—In running its trains at places where its tracks are not fenced, and where animals are liable to stray upon its tracks, a railway company is under the duty of keeping a reasonable lookout for such animals. Accordingly, when stock thus straying upon its tracks is killed by one of its trains, the railway company is responsible therefor, if its employes could, by the exercise of reasonable care, have discovered the stock in time to have avoided injury thereto. *Ib.*

11. FOR RULINGS on the law of contributory negligence, see Negligence, 6–9.

REAL-ESTATE AGENTS. See PRINCIPAL AND AGENT, 3.

REFORMATION. See EQUITY, 2, 3.

RELEASE. See FRAUD AND FRAUDULENT CONVEYANCES, 6.

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REPLEVIN.

1. ANNUAL CROPS.—Crops raised by yearly labor and cultivation are chattels, and may be recovered by replevin. *Baker v. McInturff, 505.*

2. PROPERTY SURRENDERED TO OFFICER. Where plaintiff would not surrender property except under compulsion, and the constable, though unarmed with process, demanded the property as an officer, and asserted that it was his duty as such officer to take it, then plaintiff ceased to resist or protest, and the property was taken; *held* it was not a voluntary turning over of possession, and plaintiff could maintain replevin for its recovery. *Kidd v. Johnson, 486.*

3. FIXTURES—SEVERANCE.—If ties and rails used in the construction of a railroad by any means become severed from the realty, they become the personal property of the land-owner, and are the proper subject of replevin. *Tudor Iron Works v. Hill, 472.*

4. BURDEN OF PROOF.—*Held arguendo,* that if the plaintiff's title is denied in an action of replevin, naked possession is not sufficient to sustain his right of action, but he must prove property, general or special, in the article replevied. *Scott v. Riley, 251.*

5. OBJECTION TO VERDICT.—Even if the value of each separate article of property ought to be found by the jury in a replevin case, an error in failing so to find is waived, if not objected to at the return of the verdict. *Herring v. Corder, 378.*

6. VAGUENESS OF JUDGMENT.—A judgment in replevin "that defendant recover the said ninety-one hogs and three calves, or at his election take a judgment for $442, the value of the property so adjudged to be returned to him," is a substantial compliance with the statute, and when taken with the connection is not so vague as to invalidate it. *Ib.*

RES ADJUDICATA.

1. SUCCESSIVE DAMAGES—FORMER RECOVERY.—When several annual crops are destroyed by different overflows, occasioned by the permanent obstruction of a water course, the tenant of the land may sue for the injury to each crop as it occurs, and, therefore, a former action will be no bar to a recovery in another action for damages suffered subsequently to the institution of the first suit. *McKee v. Railroad, 174.*

2. SEVERABLE CONTRACTS—FORMER RECOVERY.—Where the payments under a contract are to be made in installments, and the party bound to make them refuses altogether to carry out the contract after some of the installments have been earned, the party entitled to payment may at once sue for and recover these installments, and, after the expiration of the period contracted for, sue for his remaining damages; that is, his loss of earnings after such refusal. And

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held that this rule should prevail in this cause, though the suit for the installments earned was instituted after the time appointed by the contract for the payment of a later unearned installment. *West v. Moser, 201.*

3. PREMATURE ACTION.—*Held, arguendo,* that when a recovery on a note is defeated on the ground that the plaintiff has failed to supply a requisite consideration, the judgment will not debar his right of recovery in a subsequent action on the note, if such consideration is supplied by him after the rendition of the judgment; the first action will, in such a case, be treated like one prematurely commenced. *Whitlock v. Appleby, 295.*

4. SPECIFIC PERFORMANCE.—An action for money had and received against a husband to recover money paid on the void contract of himself and wife to sell her general realty will not be barred by a former action for specific performance of the same contract. *Gwin v. Smur, 361.*

SALES. See CUSTOM, 1–3.

1. ELEMENTS OF A SALE.—The elements of a sale are, parties competent to contract, mutual consent, absolute property in the thing transferred and a price in money. *Martin v. Ashland Mill Co., 23.*

2. BAILMENT—EXCHANGE.—Plaintiff deposited with the defendant mill company wheat with the understanding that on demand he should be entitled to so many pounds of flour per bushel. *Held,* not a bailment, nor a sale, but an exchange. *Ib.*

3. EXCHANGE DEFINED—RULES APPLICABLE THERETO.—An exchange is a reciprocal contract for the interchange of property, each party being a vendor and a vendee as in sales; the title is absolutely transferred, and the same rules are applicable as in sales. *Ib.*

4. WARRANTY—PATENT DEFECTS—INTENTION.—The general rule that a general warranty of soundness does not cover patent defects, nor defects known to the buyer, is limited by the rule that the real intention of the parties must govern in the construction of contracts; and the vendor may in express terms warrant against obvious defects, as where the condition of a horse's eyes are peculiar and a matter of doubt the vendor binds himself by declaring, "They are sound as dollars;" "I guarantee him sound in every respect." *Samuels v. Guin's Estate, 8.*

5. DAMAGES—FAILURE TO DELIVER—MARKET PRICE.—In case of a failure to deliver according to contract of sale, the ordinary measure of damages is the difference between the contract price and the market price of the goods at the time and place of delivery; but where there is no market price at the place of delivery, the market price at the place to which they were to be sent, less the cost of transportation is the measure of their value at the place of delivery. *Vanstone v. Hopkins, 386.*

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6. DELIVERY—EVIDENCE—DEMURRER.—The evidence in this case as to the delivery of a certain heating apparatus is reviewed, and it is *held* it justified the submission of the case to the jury. *Harrigan v. Welch, 496.*

7. ——— INSTRUCTIONS.—Instructions on the question of delivery, set out in the opinion, are *held* sufficient when taken in their entirety to submit the issues to the jury, and though subject to verbal criticism are not misleading or prejudicial. *Ib.*

SEDALIA. See TAXES, SPECIAL, 13.

STALLIONS.

CONSTRUCTION AND EFFECT OF CONTRACT FOR SERVICES.—The statute in regard to the publication of the terms for the service of a stallion (R. S. 1889, sec. 6732) does not invalidate a contract fixing the amount of the charges for such services; it applies only in the absence of a special agreement in relation to the amount of such charges. A contract of that character is construed in this cause. *Sturgeon v. Merritt, 160.*

STATUTES.

1. STATUTORY CONSTRUCTION—RULES.—In this case the following rules of statutory construction were applied: "A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." "Penal statutes are always to be strictly construed for the benefit of the citizen." "A statute ought to be so construed that no man who is innocent can be punished or endangered." *State v. McLain, 398.*

2. REPEAL BY IMPLICATION.—Repeals by implication are not favored. A statute, which does not repeal a prior statute in express terms, is not to be construed as having that effect, unless its provisions are plainly incompatible with those of such prior statute. Especially is this true when the prior statute is special, and the other is general. *State v. Daly, 184.*

3. REPUGNANCY.—Repugnant statutes are such as cannot stand together, and *held*, accordingly, that two statutory provisions under consideration in this cause were not repugnant, since one was in the nature of a general provision, and the other served as a limitation or exception thereto. *Negrotto v. The City of Monett, 286.*

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATIONS, STATUTE OF.

ST. LOUIS.

1. FUNCTIONS OF ASSISTANT PROSECUTING ATTORNEY OF THE ST. LOUIS COURT OF CRIMINAL CORRECTION—EFFECT OF REVISED STATUTES. *Held*, that the office and functions of the assistant prosecuting attorney of the St. Louis court of criminal correction have not been

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abolished by the act of April 12, 1877 (Laws, 1877, p. 354), or the incorporation of the provisions of that act into the Revised Statutes. *State v. Daly, 184.*

2. ——— PREPARATION OF INFORMATIONS — LODGING OF AFFIDAVIT THEREFOR.—*Held*, further, accordingly, that as the duty of preparing informations for criminal proceedings in said St. Louis court of criminal correction is specially committed committed to said assistant prosecuting attorney by the special statute relating to that court, an affidavit intended to furnish the basis of such an information is properly lodged with that officer. *Ib.*

STREET RAILWAYS. See TAXES, SPECIAL, 4.

TAXES.

RECOVERY BY PURCAHSER AT VOID JUDICIAL SALE.—One who purchases land at an invalid sale of the same for general taxes, and who subsequently pays taxes thereon, cannot, in the absence of a statutory provision therefor—and there has been none in this state since 1877—recover from the owner of the land, either the amount paid by him for the land at such sale, or the amount of the taxes subsequently paid by him. *Carter v. Phillips, 319.*

TAXES, SPECIAL.

1. THIRD CLASS CITIES—ASSESSMENT OF BENEFITS—NAME OF LOT-OWNER.—In cities of the third class in assessing benefits for the opening and extension of streets the statute requires the assessment to be made in the name of the owner of the lot benefited, and separately against each lot with the benefit chargeable to it; and the property-owners should be served with personal notice of the appointment of the jury of freeholders to make the assessments, as, where a statute requires notice without prescribing the method of service, personal notice is intended. *City of Sedalia v. Gallie, 392.*

2. SPECIAL TAX BILLS—PROVIDING FOR WORK BY ORDINANCE.—Where a city is authorized to act by ordinance, as where the statute provides that a city of the third class may provide by ordinance for the curbing and guttering of streets, the authority may be exercised by an act, termed a resolution, but adopted and approved by the mayor, with all the formalities required in the enactment of an ordinance. *City of Springfield to use v. Knott, 612.*

3. IRREGULARITIES IN PROCEEDINGS.—A special tax bill for public work will not be invalidated for the want of literal compliance with a regulation which does not affect the substantial rights or interests of the property-holders. Accordingly, where it was provided that an estimate of the cost of certain work should be made at the direction of a city council, and be submitted to the council before a contract for the work was let, and where it appeared that the estimate was in fact made and was filed with the clerk of the council, it was *held*, that, in the absence of evidence showing that

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the contract price was unreasonable, a special tax bill for the work should not be declared invalid, because the journal of the council failed to show either the submission of the estimate to the council or any direction by the council for the making of this estimate. *Ib.*

4. SECOND-CLASS CITIES—LIABILITY FOR STREET IMPROVEMENT—STREET RAILWAY.—By sections 1404, 1405 and 1406, the costs of all work on streets, etc., shall be charged as a special tax on lands on both sides of and adjoining the streets, etc.; and no statute authorizes a special tax bill to be made out against the property of a street railway company for any part of the costs of an improvement made in street over which it has built its track; such railway company has the right to remove its tracks from the street, and can in such event be in no way liable for the improvement of such street. *The Brick & Terra Cotta Co. v. Hill*, 433.

5. MATERIAL IN STREET IMPROVEMENT CONTRACT — ESTOPPEL.—A defendant in an action to enforce a special tax bill is estopped to object that after the bids were made and accepted, artificial stone was used instead of natural stone, as required in the contract, and that the council fixed the price thereof, when such substitution was made by the council at his request, and such artificial stone was used on his property with his actual knowledge and acquiescence. *Ib.*

6. IMPROVEMENT CONTRACT PERFORMED BY ANOTHER—ASSIGNMENT. Where a contract for street improvement has been substantially performed, it can make no difference that the work was performed by another; and in this case it appears that the trial court did not err in refusing to tell the jury if they found there had been an assignment of the contract there could be no recovery. *Ib.*

7. CONSTRUCTION OF ORDINANCE.—The ordinance set out in the statement is *held* to mean that the street was to be excavated ten inches below grade at the sides, gradually rising to a crown of four inches below such grade at the center of the street, as a preparation for the superstructure of boulders and gravel. *Clapton v. Taylor*, 117.

8. STREET IMPROVEMENT—LOWEST BIDDER—DUTY OF COUNCIL—PRESUMPTION.—In letting contracts for street improvements the duty of city authorities is not wholly ministerial, but partakes sufficiently of a judicial character, in the absence of fraud or misconduct, to render their conclusions binding; and the law in regard to the letting of such contract does not mean absolutely that the contract shall be given to the lowest bidder without regard to fitness, and the city authorities are presumed to have done, and not to have exceeded, their duty. *Ib.*

9. STREET GRADE—EVIDENCE.—Street grades must be fixed by ordinance, and where the ordinance and grade books referred to therein do not establish the grade to a reasonable certainty, then it would be void, and the natural surface would be taken as the true grade. *Ib.*

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10. STREET IMPROVEMENT—WHAT PROPERTY LIABLE—DEPTH OF LOT. Street improvement is charged against the property which abuts the street improved at the time the lien attaches, regardless of depth of the original lot. *Ib.*

11. DEFINITIONS—"ADJACENT."—In the charter of Sedalia, "adjacent" in the section relating to street improvement has reference to the work done on the street within a certain length, which is to be levied as a tax on the abutting property. *Clapton v. Taylor, 117.*

12. NOTICE OF LETTING CONTRACT.—Notice of the letting of contract for public work, such as street improvement, the cost of which is to be collected from the citizen, *nolens volens*, by special assessment of his property, is a matter which affects the substantial rights of the citizen, and is a condition precedent which must be fairly complied with whether prescribed by charter or ordinance. The notice in this case *held* sufficient though the last publication was on Sunday, and there was no publication the day of the letting. *Ib.*

13. STREET IMPROVEMENT—OWNER'S RIGHT TO MAKE SAME.—The charter and ordinances of Sedalia do not require that the property-owner shall be given an opportunity to make street improvements before the city lets the same out by contract. *Ib.*

TELEGRAMS.

DAMAGES FOR DELAYED DELIVERY—LIMIT OF PRESENTATION OF CLAIM FOR. Agreements limiting the time for presenting claims for damages for the delayed delivery of a telegram are universally upheld, where the time limited is reasonable, and sixty days from date of sending in a reasonable time; and the evidence in this case is *held* to show that plaintiff did, within the sixty days limited, learn of the delayed delivery and consequent damages, or could have done so by the use of ordinary diligence. *Smith-Frazier Boot & Shoe Co. v. Western Union Tel. Co., 99.*

TENDER. See ACCORD AND SATISFACTION, 2.

USAGE. See CUSTOM, 1-3.

VAGRANCY. See KANSAS CITY, 1, 2, 5.

VENDOR AND VENDEE. See MORTGAGE, 1, 2.

1. LEASE—RIGHTS OF GRANTEE OF REVERSION.—If the landlord sells and conveys the reversion after the expiration of the lease, his grantee acquires a right of action for a subsequent breach of the terms of letting thus implied, but none for a breach occurring prior to the conveyance. The purchaser in such case acquires only a right to the premises in the condition in which they are at the time of conveyance. *Haeussler v. Holman Paper-Box Co., 631.*

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2. Mutuality of contract—acceptance of offer of sale.—A binding contract of sale does rot result, where the owner of land makes an offer to sell it, and the person to whom it is made does not accept it without change or qualification, but attaches to his acceptance a condition which is refused by the owner. *Duke v. Compton, 304.*

WATERCOURSES, OBSTRUCTION OF. See Nuisances, 1–3.

WITNESS.

Competency of witness—death of one party.—When one party to a suit claims title to personalty in controversy under the distributees of a decedent, and the other party claims title to the property under a gift *causa mortis* from the decedent, the latter party is not a competent witness to establish the gift. *Scott v. Riley, 251.*

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RULES GOVERNING PRACTICE

IN THE

KANSAS CITY COURT OF APPEALS.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application.

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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the Court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): *"Summons issued on the —— day of ——, 188–, executed on the —— day of ——, 188–;"* and if any pleading be

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amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called by for bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this Court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing, in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof,

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, prepare, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where

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the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

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RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

Attest:

L. F. McCOY, *Clerk.*

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RULES OF PRACTICE

OF THE

ST. LOUIS COURT OF APPEALS.

REVISED OCTOBER 17, 1888.

TO BE IN FORCE NOVEMBER 1, 1888.

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing signed by counsel and filed for record, and no motion shall be argued orally, unless the court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE.—Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave a written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERK IN MAKING OUT TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out

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the original or any subsequent writ, or the return thereof; but in lieu thereof shall say *(e. g.): "Summons issued on the —— day of ——, 188–, executed on the —— day of ——, 188–;"* **and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.**

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14*a*.—ABSTRACTS IN LIEU OF TRANSCRIPTS WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and shall in like time file four copies thereof with the Clerk of this Court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file four copies thereof with the Clerk of this Court. Objections to such complete or additional abstract shall be filed with the Clerk of this Court within five days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time. [*To be in force from and after October 20, 1891.*]

RULE 14*b*.—COSTS FOR PRINTING ABSTRACTS AND RECORD. Costs will not be allowed either party for any abstract filed in lieu of a full transcript under section 2253, Revised Statutes, 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. [*To be in force from and after October 20, 1891.*]

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least one day before the cause is called for trial, four copies of a brief, containing: *First.* A clear and concise statement of the pleadings and facts

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shown by the record. *Second*. An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third*. If he so elects, an argument supporting each proposition made or relied on.

The appellant, or plaintiff in error, shall also deliver a copy of said brief to the attorney of respondent, or defendant in error, at least ten days before before the day on which the cause is called for hearing, and the respondent, or defendant in error, shall at least five days before the cause is called for hearing, deliver to counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further statement as he may deem necessary, and shall file four copies thereof with the Clerk, at least one day before the case is called for hearing. Counsel for appellant, or plaintiff in error, if he so elects, may reply to such brief, by delivering a copy of his reply to counsel for respondent, or defendant in error, at least one day before the cause is called for hearing. The evidence of the service of such briefs and statements shall be filed with the Clerk before the day of hearing.

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGE ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15 the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at its discretion continue or reset the cause on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the

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court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this Court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Motions for rehearing must be founded upon statements showing clearly that some fact or question decisive of the cause, and duly presented by counsel in their brief, has been overlooked by the Court, or that the decision rendered is in conflict with an express statute or with a controlling decision to which the attention of the Court has not been directed. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite party.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case, without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

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Rule 25.—Appearance of Counsel. The Counsel who represented the parties in the trial court, in any cause coming to this Court, will be held to represent the same parties, respectively, in this Court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days, before the first day of the term to which the appeal or writ of error is returnable; and, if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the Clerk of this Court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

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